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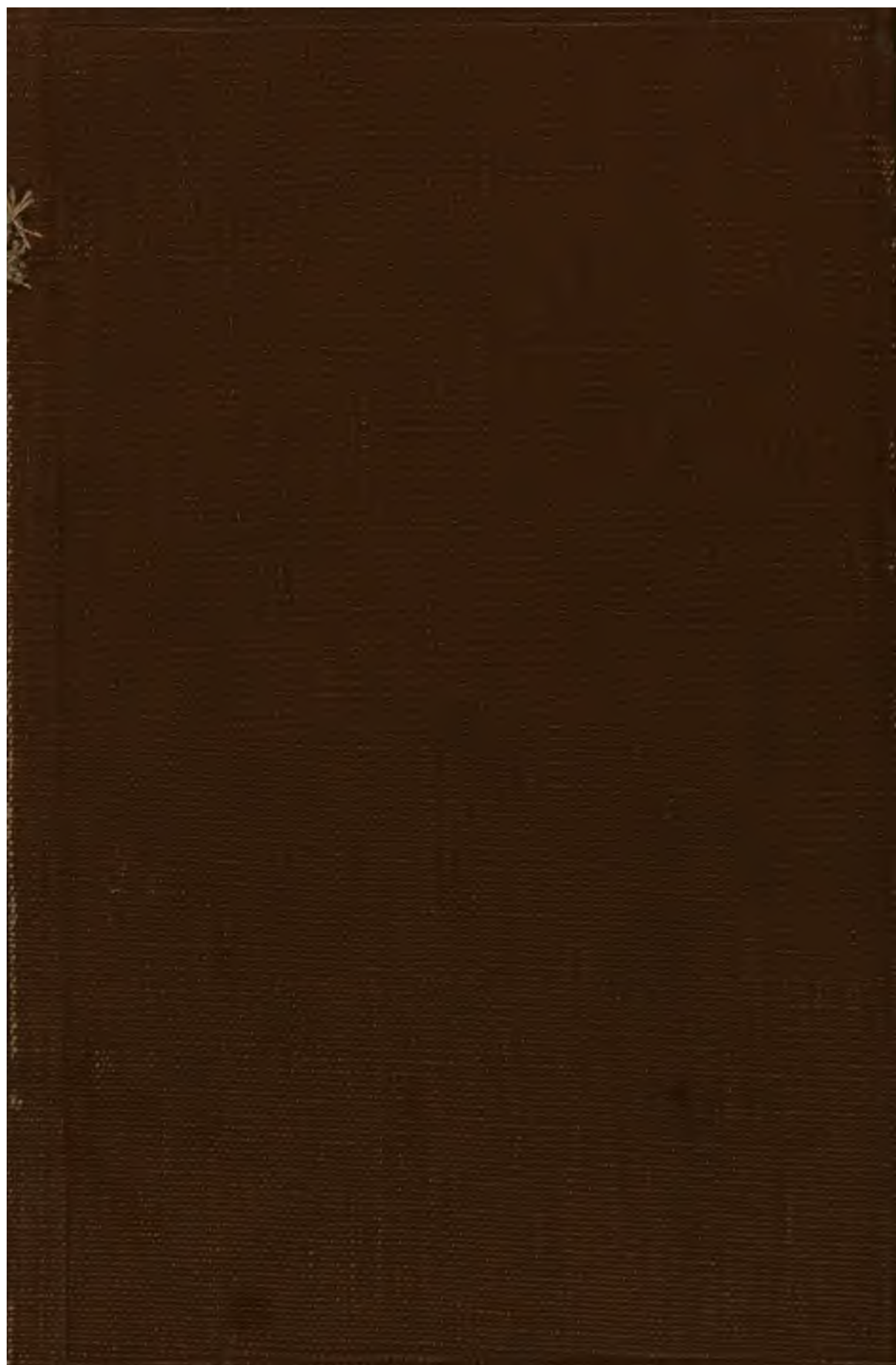
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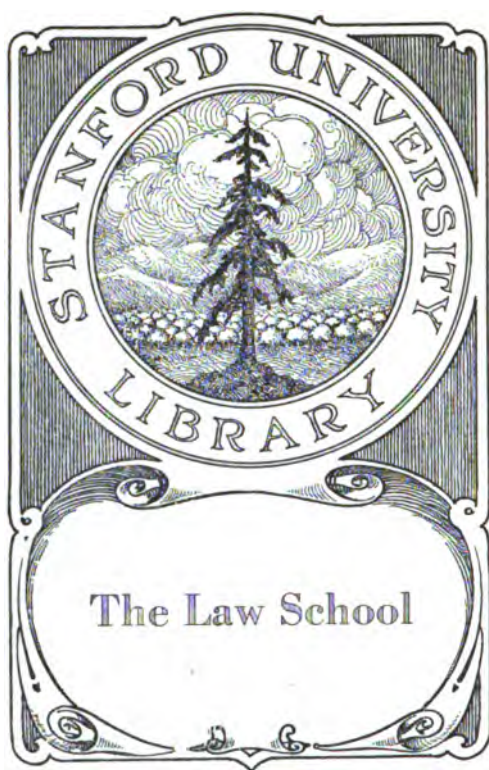
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CASES
ON
CRIMINAL LAW

SELECTED AND ANNOTATED

By
AUGUSTIN DERBY
Instructor in New York University Law School

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TO LESLIE J. TOMPKINS, OF THE NEW
YORK BAR, FOR MANY YEARS A PROFESSOR
IN NEW YORK UNIVERSITY LAW SCHOOL,
WHOSE INVALUABLE ADVICE AND GUID-
ANCE HAVE BEEN CONSTANTLY SOUGHT
AND FREELY GIVEN.

PREFACE

The cases included in this volume have been selected mainly from American Reports dating to the year 1914, and widely chosen from many state and federal jurisdictions, without preference, a few from the English decisions recognized as leading, with the aim of being equally serviceable in Law Schools of the different states devoting from one to two hours a week to the study of Criminal Law. To show the historical development of the subject, quotations from authoritative text writers of the past, and modern cases reviewing the older decisions, have been used, in place of the ancient English decisions, to which the author has observed students give little heed; in this way necessary economy of space has been effected. A brief chapter on the much neglected, yet highly important, subject of "Constitutional Rights of the Accused" has been inserted; otherwise the cases are confined to a consideration of the substantive law of Crimes, without special reference to the law of Procedure. A logical arrangement of topics has been striven for, and the cases placed, as far as possible, in a sequence which will permit the student to advance from one to another without leaving missing links of knowledge necessary to progress. Effort has been made to present cases interesting upon the facts. The footnotes have been designed to show where the law is in conflict, and also to indicate the law upon topics of which space has forbidden a fuller discussion.

AUGUSTIN DERBY.

New York City, September 1, 1914.

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CASES ON CRIMINAL LAW

CHAPTER I.

JURISDICTION OF CRIMES.

Section 1.—The United States.

UNITED STATES v. HUDSON.

1812. SUPREME COURT OF THE UNITED STATES.
7 Cranch (U. S.) 32, 3 L. ed. 259.

This was a case certified from the Circuit Court for the District of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the president and congress of the United States, contained in the Connecticut Currant, of the 7th of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the Circuit Court of the United States had a common-law jurisdiction in cases of libel.

Pinkney, attorney-general, in behalf of the United States, and Dana for the defendants declined arguing the case.

The court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by JOHNSON, J.

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this

jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power can not deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation. And such is the opinion of the majority of this court: for, the power which congress possess to create courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction—much more extended—in its nature very indefinite—applicable to a great variety of subjects—varying in every state in the Union—and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here con-

tended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—enforce the observance of order, etc., are powers which can not be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers.¹

Section 2.—The States.

STATE v. LAFFERTY.

1817. HARRISON COMMON PLEAS COURT (Ohio). Tappan 81.

Lafferty was convicted, on three several indictments, for selling unwholesome provisions. * * *

PRESIDENT.²—The question raised on this motion, whether the common law is a rule of decision in this state, is one of very great interest and importance, and one upon which contradictory opinions have been holden both at the bar and upon the bench.

No just government ever did, nor probably even can, exist, without an unwritten or common law. By the common law, is meant those maxims, principles, and forms of judicial proceedings, which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws; and, by such incorporation, form a part of the municipal code of each state or nation, which has emerged from the loose and erratic habits of savage life, to civilization, order and a government of law.

For the forms of process, indictment and trial, we have no statute law directing us; and for almost the whole law of evidence,

¹ Accord: *United States v. Coolidge*, 1 Wheat. (U. S.) 415, 4 L. ed. 124; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591; see also, *United States v. Worrall*, 2 Dall. (U. S.) 384, 1 L. ed. 426, Fed. Cas. No. 16766.

² Arguments of counsel, and parts of the opinion are omitted.

in criminal as well as in civil proceedings, we must look to the common law, for we have no other guide. Can it be said, then, that the common law is not in force, when, without its aid and sanction, justice can not be administered; when even the written laws can not be construed, explained, and enforced, without the common law, which furnishes the rules and principles of such construction?

We may go further and say, that not only is the common law necessarily in force here, but that its authority is superior to that of the written laws; for it not only furnishes the rules and principles by which the statute laws are construed, but it ascertains and determines the validity and authority of them. It is, therefore, that Lord Hobart said, that a statute law against reason, as to make a man a judge in his own cause, was void.

As the laws of nature and reason are necessarily in force in every community of civilized men (because nature is the common parent, and reason the common guardian of man), so with communities as with individuals, the right of self-preservation is a right paramount to the institution of written law; and hence the maxim, *the safety of the people is the supreme law*, needs not the sanction of a constitution or statute to give it validity and force; but it can not have validity and force, as law, unless the judicial tribunals have power to punish all such actions as directly tend to jeopardize that safety; unless, indeed, the judicial tribunals are the guardians of public morals and the conservators of the public peace and order. Whatever acts, then, are wicked and immoral in themselves, and directly tend to injure the community, are crimes against the community, which not only *may*, but *must*, be repressed and punished, or government and social order can not be preserved. It is this salutary principle of the common law which spreads its shield over society, to protect it from the incessant activity and novel inventions of the profligate and unprincipled, inventions which the most perfect legislation could not always foresee and guard against.

But although the common law, in all countries, has its foundation in reason and the laws of nature, and therefore is similar in its general principles, yet in its application it has been modified and adapted to various forms of government; as the different orders of architecture, having their foundation in utility and graceful proportion, rise in various forms of symmetry and beauty, in accordance with the taste and judgment of the builder. It is also a law of liberty; and hence we find, that when North America was colonized by emigrants who fled from the pressure of monarchy and priestcraft in the old world, to enjoy freedom in the new, they brought with them the common law of England (their mother country), claiming it as their birthright and inheritance. In their charters from the crown, they were careful to have it recognized as the foundation on which they were to erect their laws and governments: not more anxious was Aeneas to secure from the burning

ruins of Troy his household gods, than were these first settlers of America to secure to themselves and their children the benefits of the common law of England. From thence, through every stage of the colonial governments, the common law was in force, so far as it was found necessary or useful. When the revolution commenced, and independent state governments were formed; in the midst of hostile collisions with the mother country, when the passions of men were inflamed, and a deep and general abhorrence of the tyranny of the British government was felt; the sages and patriots who commenced that revolution, and founded those state governments, recognized in the common law a guardian of liberty and social order. The common law of England has thus always been the common law of the colonies and states of North America; not indeed in its full extent, supporting a monarchy, aristocracy, and hierarchy, but so far as it was applicable to our more free and happy habits of government.

But suppose that the position is a correct one, that the principles of the common law have no force or authority in this state, and what are the consequences? They are these: that there are no legal forms of process, of indictments, or trials; there is no law of evidence; and the statute laws can not be enforced, but must remain inoperative from the uncertain signification of the terms used in defining criminal offenses. Beside, the constitution gives jurisdiction to this court in criminal matters, "*in such cases and in such manner as may be pointed out by law*;" and as we have no statute pointing out the manner in which such jurisdiction shall be exercised, the consequence follows that it can not be lawfully exercised in any manner whatever.

On the whole, therefore, it may be concluded, that were the written laws wholly silent on the subject, the principles and maxims of the common law must, of necessity, be the rule and guide of judicial decision, in criminal as well as in civil cases: to supply the defects of a necessarily imperfect legislation: and to prevent "the will of the judge, that law of tyrants," being substituted in the room of known and settled rules of law in the administration of justice.

And that by the ordinance of congress, the constitution and laws of the state, a common law jurisdiction in criminal cases is established and vested in this court. The motion in arrest is, therefore, overruled.

The defendant was fined fifty dollars in each case, with costs.³

³ Even in a state where common-law crimes do not exist, the common-law definition of a crime will be adopted, when the statute names, but does not define the offense. *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117.

STATE v. PULLE.

1866. SUPREME COURT OF MINNESOTA. 12 Minn. 164.

WILSON, C. J.⁴ The common law so far as it is applicable to our situation and government, is, as a general rule, the law of this country. Every state, with perhaps one exception, has adopted it, either tacitly or by express statutory enactment. See 1 Kent's Commentaries, 470-3, note and cases in note. That it is the law of this state, controlling both the rights and the remedies of parties in actions between individuals, either on a contract or for a tort, can not be doubted, for the courts have recognized and acted on this fact ever since the organization of our territorial government, and we find no evidence which satisfies us that either the state or territory intended to repudiate the common law as a source of jurisdiction in either criminal or civil cases. It having been adopted in civil cases, the presumption certainly is that it was adopted as an entirety, so far as it is not inconsistent with our circumstances, or statutory or constitutional law. Nor do the laws in force in Wisconsin territory at the date of the admission of the state of Wisconsin (which, by our organic act were declared to be valid and operative in Minnesota territory) rebut this presumption. There is nothing in these laws which shows that the territory of Wisconsin abrogated or repealed the common law as to crimes, but on the contrary, we think they show that it was recognized and adopted in that territory. That our statutes expressly abolish common-law offenses, is not pretended. A statute which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail. Or we may admit, for the purposes of this case that when a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals, by implication, the prior law, though there is no repugnancy. Beyond this the authorities do not go in sustaining a repeal of the common law by implication. On the contrary, it is well settled that where a statute does not especially repeal or cover the whole ground occupied by the common law it repeals it only when, and so far as directly and irreconcilably opposed in terms. See 1 Bish. Cr. Law (3d ed.), §§ 195 to 200, and cases cited in notes to said sections.

Our statutes fall far short of covering the whole field of common law crimes. It is not pretended that conspiracy is, by them, made a crime, and we think it very clear that libel is not, and many other instances might be added. We think, therefore, that they do not by implication, abolish these crimes. But further than this, we think our statutes clearly recognize the existence of common law

⁴ The opinion only is printed.

offenses. Sec. 2, ch. 87, Comp. Stat., reads as follows: * * * "Crimes and public offenses and criminal proceedings are modified as prescribed in these statutes." The Revised Statutes were adopted in 1851, and the language above quoted was added as an amendment in 1852. It is perhaps true that this amendment did not change the meaning of the statutes, but legislators frequently, and properly make use of language, which, strictly speaking, is unnecessary, out of abundant caution, and for the purpose of making clear what otherwise might, in the minds of some, admit of doubt. We think, in this view, the legislature must have used the language above quoted, to show that our statutes, as to crimes, were intended merely as a *modification*, and not as an entire repeal, or abrogation of the common law. This seems to us the fair and natural meaning of the language, and any other construction suggested seems forced and unauthorized. Sec. 34 of ch. 90 of said statutes reads: "Every person who shall be convicted of any gross fraud or cheat, at common law, shall be punished," etc. Sec. 5, ch. 98, *ib.*, reads: "Every person who shall become an accessory after the fact, to any felony, either by common law, or by any statute made, or which shall hereafter be made, may be indicted," etc. Our statutes, in no place, declare that any act shall constitute the crime of libel, or that such crime shall be punished, yet they provide as to what evidence may be given, and as to the form and substance of the indictment in prosecutions for such crime. Comp. Stat. 734, § 6; *ib.* 756, § 3; *ib.* 760, § 17. These sections are an admission, or recognition by the legislature of the fact that common law offenses may be punished in this state. This conclusion is in accordance with the views entertained by the courts generally throughout the United States. See authorities cited in note to § 36, 1 Bish. Cr. Law (3d ed.).

Ohio seems to be an exception to this general rule, but we have carefully examined the statutes of that state, and do not find that they, like our statutes, recognize the existence of common-law offenses. The cases cited from that state can, therefore, not be held as opposed to the decision arrived at in this case. The case of *Estes v. Carter*, 10 Iowa 400, holds that no common-law offense not recognized by the criminal statutes of that state will be treated or punished as a crime by the courts. The decision is based on two grounds: 1st, the peculiar wording of the constitution of that state; and, 2d, that the statutory offenses so nearly cover all the common-law offenses that it is reasonable to infer that those which were omitted were intended to be excluded. If the statutes of that state, to which we have not had access, are similar to ours, we can not admit that the second ground on which the decision is based is tenable, for it is certainly a well settled rule, that statutes are not to be construed as repealing the common law beyond their words, or the clear expression of their provisions. Beyond this, no ad-

mitted rule of interpretation permits us to presume an intention to repeal. See authorities above cited.

There is a remark made by the court in the case of *Benson v. State*, 5 Minn. 21, which the counsel for the defendant refers to in support of his view, but the point was not considered or decided by the court in that case. This remark deserves, and has received, the consideration due to the views of the learned judge who delivered that opinion. Whether it would be wise for the legislature to repeal the common law as a source of jurisdiction in criminal matters, it is not for us to determine.

If common-law crimes are suspended or abolished by our statutes, so are "criminal proceedings;" but the legislature, by the express and particular repeal of certain criminal practice and proceedings (Comp. Stat., p. 735, § 14; *ib.*, p. 785, § 37), clearly indicated that they did not consider the general statute as affecting such repeal. The gist of this offense is the unlawful confederation, and it is not necessary to prove an overt act in pursuance of it. *Commonwealth v. Judd*, 2 Mass. 329. The exceptions are overruled.

BERRY, J.—I dissent. In my judgment no offenses at common law are offenses in this state, except such as are specifically recognized by our statutes.

CHAPTER II.

CONSTITUTIONAL RIGHTS OF THE ACCUSED.

Section 1.—Right to a Jury Trial.

The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter. * * * The antiquity and excellence of this trial for the settling of civil property has before been explained at large. And it will hold much stronger in criminal cases; since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and the subject, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and trial by jury, between the liberties of the people and the prerogative of the crown. 4 Black. Com. 349.

MAXWELL v. DOW.

1900. SUPREME COURT OF THE UNITED STATES. 176 U. S. 581, 44 L. ed. 597.

Mr. JUSTICE PECKHAM delivered the opinion of the court.¹

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in the state court of the state of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

¹ Part of the opinion of Peckham J., and the dissenting opinion of Harlan J., are omitted.

In May, 1899, he applied to the Supreme Court of the state for a writ of habeas corpus, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful, because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under article 5 of the amendments to the constitution of the United States, and also violated section 1 of article 14 of those amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under article 6, and also violated section 1 of article 14 of such amendments; (3) that a trial by such a jury and his subsequent imprisonment, by reason of the verdict of that jury, deprived him of his liberty without due process of law, in violation of section 1 of article 14, which provides that no state shall deprive any person of life, liberty or property, without due process of law.

The Supreme Court of the state, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the state prison, to undergo the remainder of his sentence, and he then sued out a writ of error and brought the case here.

* * * * *

It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each state for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. *Caldwell v. Texas*, 137 U. S. 692; *Leeper v. Texas*, 139 U. S. 462. It is emphatically the case of the people by their organic law, providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado* case, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment there can be no just

fear that the liberties of the citizens will not be carefully protected by the states respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the federal government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown v. New Jersey*, 175 U. S. 172, the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution. The legislation in question is not, in our opinion, open to either of these objections.

Judged by the various cases in this court we think there is no error in this record, and the judgment of the Supreme Court of Utah must, therefore, be affirmed.

PEOPLE EX REL. JOHN MURRAY, v. THE JUSTICES OF
THE COURT OF SPECIAL SESSIONS.

1878. COURT OF APPEALS OF NEW YORK. 74 N. Y. 406.

Error to the General Term of the Supreme Court, in the first judicial department, to review judgment, affirming a judgment of the Court of Special Sessions of the peace in and for the city and county of New York, convicting the relator of an assault and battery.

The facts appear sufficiently in the opinion.

* * * * *

CHURCH, C. J.² The relator was arrested and brought before a police justice on a charge of assault and battery, and being held upon such charge he elected to be tried by the Court of Special Sessions of the peace, and in default of bail was committed to jail. Afterwards he was brought before Judge Donohue upon habeas corpus, and gave bail to appear before the Court of Special Sessions for trial. He did appear and was tried by the court without objection, and was convicted and sentenced to four months' imprisonment. The counsel for the relator claims that he had the constitu-

² Arguments of counsel, and part of the opinion are omitted.

tional right of trial by jury which he did not and could not waive. This point is not tenable for the reason that the constitutional provision does not apply to the petty offenses triable before a Court of Special Sessions. The provision is "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." This means a common-law jury of twelve men. Courts of Special Sessions have existed since 1744, and have been continued both under the colonial and state government to the present time. No jury was permitted in these courts until 1824, when the legislature provided for a jury of six to be selected from twelve to be drawn if demanded by the accused, and this is the law throughout the state at the present time except in the city of New York. There, if an accused person elects to be tried before the Court of Special Sessions he is tried without a jury. If he elects to be tried at the General Sessions he must be proceeded against by indictment, and is entitled to a constitutional jury, and the rule invoked by the relator would apply. A trial by such a jury was not used at the time of the adoption of the present constitution in trials by Courts of Special Sessions for the offense charged against the relator in this case. *Murphy v. The People*, 2 Cow. 815, and note; *In the Matter of Sweatman*, 1 *ib.* 151, and note; *Cancemi v. People*, 18 N. Y. 128.]

* * * * *

It is also insisted that the organization of the Court of Special Sessions is unconstitutional. The answer to the first point substantially answers this. It is to be observed that a person charged with an offense, although triable by the Special Sessions, is not compelled to be tried there. He may be tried in the Court of General Sessions by a jury, but he may elect to be tried by the Special Sessions, and if he so elect he must be tried without a jury in the city of New York, and elsewhere he may have the statutory jury of six. As such trials were had before the adoption of the constitution, the jury trial preserved by that instrument does not apply. No reason is perceived why there should be a distinction in respect to the right to demand the statutory jury of six in the Special Sessions between the city of New York, and the other counties of the state. The rule should be uniform, and the right of a trial by such jury at least is more in accordance with the spirit of our laws than a trial by the court. The distinction between city and county in this regard is incongruous and unjust, but we have no control over that question. No error is alleged to have occurred on the trial, and we think the court has jurisdiction.

The judgment must be affirmed.

All concur, except Miller and Earl, J. J., absent.

Judgment affirmed.³

³ Accord: holding that the right to trial by jury does not apply to

Section 2.—Right to Refrain from Self-Incrimination.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation. Constitution of United States, Amendment Article V.

STATE v. REASBY.

1896. SUPREME COURT OF IOWA. 100 Iowa 231, 69 N. W. 451.

The defendant, Noah Reasby, was convicted of the crime of robbery and, from the judgment, which required him to be imprisoned in one of the penitentiaries of this state for the term of fifteen years, he appeals. Affirmed.

ROBINSON, J.⁴ In the evening of the fourth day of July, 1895, Henry Galliers was struck on the head, and made insensible, and several dollars in money were taken from his pocket. The injury was so severe that he did not recover consciousness for two or three weeks. The defendant, Reasby, and one Lud Struther, were jointly indicted for the offense. Reasby was tried separately, and convicted, as stated.

1. During the trial of the defendant, and while Galliers was on the witness stand, but before he was asked who the persons he claimed to have been present at the time of the robbery were, an attorney of the defendant caused a brother of the defendant to sit by him, as a test on the question of identity. An attorney who was assisting at the trial in behalf of the state, whispered something to the presiding judge in regard to the defendant's brother being the defendant, and stated aloud that they had changed places. An attorney for the state then asked the court to require the defendant's brother to retire, or to cause the defendant to rise for identification, and the court thereupon directed the defendant to stand. An attorney for the defendant at once objected, stating

certain minor offenses triable, prior to the adoption of the constitutions, without a jury. *State v. Glenn*, 54 Md. 572; *Byers v. Commonwealth*, 42 Pa. St. 89; *Goddard v. State*, 12 Conn. 448; *State v. Kennan*, 25 Wash. 621, 66 Pac. 62; *Inwood v. State*, 42 Ohio St. 186.

⁴ Part of the opinion is omitted.

that he would stand up for the defendant, but the court ordered the defendant a second time to stand, and he arose. The county attorney then stated, "That is not the man." The defendant sat down, and, Galliers being asked if he could identify the man, stated "that he could, and that the man who stood up was the man." We understand this to mean that the witness said that the man who arose was one of those who were present when the robbery was committed. The appellant contends that the order of the court was erroneous, because it compelled him to criminate himself. It is certainly proper for the court to require the defendant who is accused of felony, and who is present at his trial, to make himself known. When the objection in question was made, an attorney for the state in response to it, referred to the defendant and his brother as looking very much alike, and we are justified in concluding from the experiment attempted by the defendant that there may have been such a resemblance. The court appears not to have known who the defendant was, and had the right to cause him to identify himself. The fact that he was accused of the crime was not evidence of guilt, and to require him to stand in the presence of the witness and jury did not compel him to furnish evidence of his guilt. We are not aware of any rule of law which entitles the defendant, in a criminal case, to remain concealed during his trial lest his presence might aid in his identification. Yet, the rule contended for by the defendant, carried to its logical conclusion, would lead to that result. It is a very common practice to refer witnesses for the state, in a criminal case, to the defendant, and ask questions concerning him and his alleged offense, and it often happens that a witness is able to testify more particularly, and that the jurors are able to understand more readily, the defendant's connection with the crime charged, by reason of the fact that they see him, and in consequence are better able to apply the evidence to him, and to judge of its value. But where that is done, the defendant does not furnish evidence to criminate himself. This case is unlike one where the accused is compelled, against his will, to submit to a personal examination or to an experiment to determine some mooted question, and thus furnish evidence which would tend to connect him with the crime of which he is accused. What the rule applicable to such a case is, we have no occasion to determine. The object which the defendant had in view, was really to test the ability of the witness to identify one of his assailants, and it would have been within the power of the trial court to permit the test to be made. But in refusing to allow it, the discretion of the court was not abused.

* * * * *

Affirmed.⁵

⁵ The accused can not be compelled to submit to a physical examination, or to exhibit any part of his body to the jury. *Blackwell v. State*,

PEOPLE v. COURTNEY.

1884. COURT OF APPEALS OF NEW YORK. 94 N. Y. 490.

Appeal from judgment of the general term of the Supreme Court, of the first judicial department, entered upon an order made December 21, 1883, which affirmed a judgment of the Court of General Sessions of the peace in and for the city and county of New York, entered upon a verdict convicting defendant of the crime of perjury.

The indictment charged, in substance, that defendant, on the trial of an indictment against him for forgery, testified in his own behalf, and gave material testimony; that in answer to questions put to him on cross-examination, he falsely testified that he never went by any other name than that of Edward J. Courtney; that he never was an inmate of the Eastern penitentiary of Pennsylvania; and that he never served a term of imprisonment in any prison. Defendant demurred to the indictment on the ground "that the facts stated in the indictment do not constitute a crime." The demurrer was disallowed.

On the trial, after proving the giving of the testimony as set forth in the indictment, the prosecution proved that defendant had been convicted and sentenced to imprisonment for three years in the Eastern penitentiary of Pennsylvania, under the name of Christopher Richards; and that he served his term in that penitentiary. At the close of the evidence, defendant's counsel asked the court to direct an acquittal, upon the ground that the alleged false statements "were immaterial, irrelevant and in no way affecting the issue, and not the subject of an indictment." The court denied the request.

* * * * *

ANDREWS, J.⁶ The argument in support of the demurrer to the indictment rests upon three propositions: *First*, that by section 6, article 1, of the constitution, no person can be compelled in a criminal case to be a witness against himself; *second*, that the act chapter 678 of the Laws of 1869, violates this constitutional provision; and *third*, that false swearing on the trial of an indictment, by the party indicted, on his examination, under the act of 1869, is not, therefore, legal perjury.

Whether the conclusion is a logical or legal deduction from the premises, need not be considered, for the reason that the minor premise is not well founded. The act of 1869 is permissive, and not compulsory. It permits a person charged with crime to be a

67 Ga. 76, 44 Am. Rep. 717; State v. Jacobs, 50 N. Car. 259; People v. McCoy, 45 How. Pr. (N. Y.) 216; Contra, State v. Ah Chuey; 14 Nev. 79, 33 Am. Rep. 530.

⁶ Arguments of counsel, and part of the opinion are omitted.

witness in his own behalf. But it does not compel him to testify nor does it permit the prosecution to call him as a witness. He can be sworn only at his election, and the statute declares that his omission or refusal to testify shall create no presumption against him. The policy of the act of 1869 has been criticised in some cases in this court. But the policy or propriety of a law is a legislative, and not a judicial question. The supposed moral coercion upon a person accused of crime to offer himself as a witness by reason of the adverse inference which might be drawn from his omission to testify, when presumably all the facts are known to him, is not compulsion within the meaning of the constitution.

The constitution primarily refers to compulsion exercised through the process of the courts, or through laws acting directly upon the party, and has no reference to an indirect and argumentative pressure such as is claimed is exerted by the statute of 1869. A law which, while permitting a person accused of crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudging guilt without evidence, and while it might not be obnoxious to the constitutional provision against compelling a party in a criminal case to be a witness against himself, would be a law reversing the presumption of innocence, and would violate fundamental principles, binding alike upon the legislature and the courts. The act of 1869 expressly precludes such a presumption from the silence of the accused, and while it may be difficult for a jury in many cases to exclude the inference of guilt from an omission of a defendant to be sworn, we can not assume that it may not be done. The statute assumes it to be possible, and we can not say, judicially, that such assumption is unfounded. The demurrer was, therefore, properly overruled.

COUNSELMAN v. HITCHCOCK.

1892. SUPREME COURT OF THE UNITED STATES. 142 U. S. 547, 35 L. ed. 1110.

From the opinion of BLATCHFORD, J.:

It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was in-

tended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

It is argued for the appellee that the investigation before the grand jury was not a criminal case, but was solely for the purpose of finding out whether a crime had been committed, or whether any one should be accused of an offense, there being no accuser and no parties plaintiff or defendant, and that a case could arise only when an indictment should be returned. In support of this view reference is made to article 6 of the amendments to the constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, to be confronted with the witnesses against him, to have compulsory process for witnesses, and the assistance of counsel for his defense.

But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments, is much narrower than a "criminal case," under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

We can not yield our assent to the view taken on this subject by the Court of Appeals of New York, in *People v. Kelly*, 24 N. Y. 74, 84. The provision of the constitution of New York of 1846 (Art. 1, § 6), was that no person shall "be compelled, in any crim-

inal case, to be a witness against himself." The court, speaking by Judge Denio, said: "The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against *him*; for what is forbidden is that he should be compelled to be a witness against himself." This ruling, which has been followed in some other cases, seems to us, as applied to the provision in the fifth amendment to the constitution of the United States, to take away entirely its true meaning and its value.

Section 3.—Right to be Confronted by Witnesses.

PEOPLE v. DOW.

1887. SUPREME COURT OF MICHIGAN. 64 Mich. 717,
31 N. W. 597, 8 Am. St. 873.

Information for burglary. Respondent convicted. Reversed and new trial ordered. The facts are stated in the opinion.

MORSE, J. The respondent was tried and convicted in the recorder's court of the city of Detroit of burglary.

On the night of the twenty-sixth of April, 1886, about 3 o'clock in the morning, the house of John B. Moloney, in the city of Detroit, was broken into and entered, and several articles stolen therefrom, among them a gold watch and chain.

The evidence against the respondent tended to show him in company with Thomas Powers that evening and early next morning, and with him at one place where Powers attempted to dispose of the watch stolen from Moloney's residence, and also at one Rosenberg's, where Powers sold the watch.

George Marrow testified that he met Powers and Dow on Woodward avenue, and went to a saloon, where Powers asked him to buy a couple of tickets to Rochester, New York, in the presence of Dow, and said that he did not want to go down town because he was afraid he would be arrested; that he had been arrested in Detroit once before, and was afraid he would be arrested again as a suspicious character, but they couldn't do anything with him but hold him for a couple of days, and he wanted to buy the tickets for that week. Both the respondents gave him money, \$15 in all, and Marrow took it, and went and purchased the tickets, and met Powers and Dow at a saloon afterwards, where arrangements had been made to meet, and gave them the tickets.

This testimony as to what Powers said was objected to as incompetent as against Dow, who was having a separate trial. The evi-

dence was competent. The occurrence was soon after the burglary, and Dow seems to have been equally interested with Powers in the purchase of these tickets, and the use of them. He was arrested at Rochester. The conversation was in his presence and hearing, and therefore admissible.

The main objection and exception relates to the admission in evidence of the official record of the weather, as kept in the office of N. B. Conger, signal officer in charge of the signal service station at Detroit.

Mr. Conger was offered as a witness, and testified that he kept a record of the weather in his office, and had the official record with him. He was then asked to state the condition of the weather on the evening of April 26, referring to such record. It was objected to as incompetent. Objection overruled. He then testified it was not in his handwriting, but was taken under his supervision. The fact of the record not being in the handwriting of the witness was then made the basis of another objection to its reception in evidence. The court, after some hesitation, allowed the record to be put in evidence.

On cross-examination it appeared that the witness left the signal office at 6 o'clock in the evening, and did not return until the next morning. When he went away, he left his assistant, Mr. Baldwin, in charge of the office. Did not know of his own knowledge that Baldwin or the other assistant remained in the office all night, but supposed one of them did. According to this record, the night of the twenty-sixth rain commenced by meridian time at 7:10 P. M., and ended at 9:30 P. M., and then commenced again at 9:51 P. M., and stopped at 11:45 P. M. On the twenty-seventh, beginning at 7 A. M., the weather was clear. No observations were taken after 11:45 P. M. This evidence was introduced in rebuttal of the evidence in regard to rain by the witnesses for the defense, whose testimony tended to show an alibi. The following questions were put to Conger on cross-examination:

"Q. Can you swear, of your own knowledge, that your assistants took these observations on the night in question?

"A. Yes, sir.

"Q. Of your own knowledge?

"A. Yes, sir; I didn't see them, of course. The observations are in their handwriting here in this original record."

The counsel for the respondent argues that this record, not being made by the witness himself, and the persons who made it not being sworn, and there being no certainty that they went outside of the office and took the observations recorded by them, is not admissible in a criminal cause. He contends that the admission of such record is in violation of the constitutional provision that the accused shall have the right to be confronted with the witnesses against him. We have heretofore held that this provision does

not apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially certified. *People v. Jones*, 24 Mich. 225. But that is not this case. This court has also held that market reports, and the records of the weather as kept at the asylum at Kalamazoo, were properly admitted in civil cases. *Sisson v. Cleveland & T. R. R. Co.*, 14 Mich. 489, 497; *De Armond v. Neasmith*, 32 *ib.* 231, 233; *Cleveland & T. R. R. Co. v. Perkins*, 17 *ib.* 296.

The record of the weather in this case was not one made by the witness, or one that he knew certainly to have been accurately made in accordance with the actual state of the weather. It seems to me that the presumption in favor of the correctness of this record, because it is an official one, if such presumption can be said to exist under the circumstances shown as to the manner of the observations being taken and the record being kept, can not be used against the respondent in a criminal case. It was a vital question upon the trial whether the testimony looking towards an alibi was true or not, and the condition of the weather that evening was important in aiding the jury in their determination of that question.

If Conger had made the record himself, or taken the observations himself, the evidence would have been competent; but the respondent was entitled to have the testimony of Baldwin, or the assistant who took the observations and made the record of the same, and to be confronted with such witness. As it was, the presumption arising from its being an official record only saved it from being hearsay testimony. This official statement or record of the weather, though required to be kept, and therefore an official document, is not, however, a record of facts which can only be proved by the original, or a properly certified copy. The facts therein stated are facts open to the observation of anybody, and capable of being established satisfactorily by oral testimony, or minutes kept by a private person, if such minutes refresh his recollection.

The record ought not to have been introduced in evidence without the presence of the man who made the observations and the record, on the stand, so that the accuracy of such record could have been inquired into.

For this error the judgment must be reversed, and a new trial granted.

The other justices concurred.

STATE v. NELSON.

1904. SUPREME COURT OF KANSAS. 68 Kans. 566, 75 Pac. 505,
1 Ann. Cas. 468.

Appeal from Montgomery District Court. Thomas J. Flannelly, judge. Opinion filed February 6, 1904.

Affirmed.

The opinion of the court was delivered by

MASON, J.⁷—John Nelson, charged with the murder of Albert Morris, was convicted of manslaughter in the second degree, and appeals. The principal claim of error is based upon the fact that the prosecution was permitted to introduce in evidence the testimony given by a witness at a former trial of the same case, such witness having left the state, and being therefore beyond the reach of process. It is argued by appellant that this was a denial of the constitutional right of the accused in a criminal prosecution to meet the witnesses face to face. The State v. Foulk, 57 Kan. 255, 45 Pac. 603, is cited as supporting this contention, but it does not reach the question at issue. There it was held to be error to admit in evidence, over the objection of defendant, the testimony given by a witness in a former trial, but the record discloses the fact that one objection made to it was that the whereabouts of the witness was known to the state and no reason had been shown why he was not produced. It was agreed that he was confined in the penitentiary, but this did not necessarily prevent his being brought into court. His imprisonment made him an incompetent witness, but this is an objection the defendant might have waived and apparently was disposed to waive. A reading of the opinion shows that the question whether such testimony might be received when for any reason the attendance of the witness could not be procured was neither determined nor discussed by this court.

The question is one upon which the decisions are in conflict. They are well collected and arranged in 14 Cent. Dig., col. 1933, § 1233, and col. 2272, § 1542. But the authorities are so nearly unanimous that they may be said to be in substantial agreement that the former testimony of a witness who has since died may be used in further proceedings in the same criminal case, over the objection of the defendant. (14 Cent. Dig., col. 1931, § 1232.)

In the State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257, the rule was applied where the action in which the testimony was used was not technically the same as that in which it was taken, both, however, being prosecutions for the same criminal act. Some cases base this doctrine upon a construction given to the constitution as a matter of compelling necessity, to avoid a failure of justice

⁷ Part of the opinion is omitted.

(*Marler v. The State*, 67 Ala. 55, 42 Am. Rep. 95); or upon the ground that the constitutional provision in this regard is but declaratory of the common law, under which this practice was allowed. (*State v. McO'Blenis*, 24 Mo. 402, 69 Am. Dec. 435.) Others hold that the provision in question is met by the defendant being confronted by the witness who undertakes to state the testimony formerly given by the person since deceased, leaving to be determined only the competency of that kind of evidence. The great majority of courts that have permitted such evidence at all have done so either upon this ground, or upon the theory that, when the defendant has once met a witness face to face and had an opportunity to cross-examine him, the constitutional requirement has been satisfied, and that no necessity exists, so far as the constitution is concerned, for again producing that witness in court.

* * * * *

It is obvious that if either of these two propositions is sound, it applies with as much force when a witness is beyond the reach of process as when he is dead. In the elaborately considered case of *Cline v. The State*, 36 Tex. Cr. Rep. 320, 37 S. W. 722, 61 Am. St. Rep. 850, in which the authorities are reviewed at length, the court recognizes this fact and repudiates the entire doctrine, overruling many earlier Texas cases, and taking a position in opposition to the current of judicial decision. Logically, there seems no middle ground. Unless the requirement of the constitution is complied with, the death of a witness should not permit the use of his testimony. If it is complied with, the evidence should be admitted, unless open to some objection other than the constitutional one. Accordingly, as already stated, in a large number of cases it is held that the absence of the witness from the jurisdiction of the court, and the consequent impossibility of compelling his attendance, justifies the use of his former testimony. While there are also many decisions to the contrary, the recent tendency seems to favor the rule stated.

* * * * *

The judgment is affirmed.
All the justices concurring.

Section 4.—The Right Not to be Placed Twice in Jeopardy.

“First the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any

indictment or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 Black. Com. 335.

UNITED STATES v. AMY.

CIRCUIT COURT OF UNITED STATES. 14 Md. 149, note.

From the opinion of TANEY, C. J.

In maintaining the power of the United States to pass this law, it is, moreover, proper to say that as these letters, with the money within them were stolen in Virginia, the party might undoubtedly have been punished in the state tribunals according to the laws of the state, without any reference to the postoffice or the act of congress, because from the nature of our government, the same act may be an offense against the laws of the United States, and also of a state, and be punishable in both. This was considered and decided in the Supreme Court of the United States, in the cases of Fox v. The State of Ohio, 5 Howard 43, and in the case of the United States v. Peter Marigold, 9 Howard 560; and the punishment in one sovereignty is no bar to his punishment in the other.

Yet in all civilized countries it is recognized as a fundamental principal of justice that a man ought not to be punished twice for the same offense. And if this party had been punished for the larceny by a state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the president, to give him an opportunity of ordering a *nolle prosequi* or granting a pardon.⁸

ALLEN v. STATE.

1906. SUPREME COURT OF FLORIDA. 52 Fla. 1, 41 So. 593,
10 Ann. Cas. 1085.

This case was decided by Division B.

Writ of error to the criminal court of record for Duval county. The facts in the case are stated in the opinion of the court.

TAYLOR, J.—The plaintiff in error as defendant below was in-

⁸ Contra, holding that where an offense has been punished by one sovereignty, another can not subsequently punish it. Commonwealth v. Fuller 8 Metc. (Mass.) 313, 41 Am. Dec. 509.

formed against in the criminal court of record for Duval county for the crime of forgery, was tried, convicted and sentenced, and seeks relief here by writ of error.

On March 7, 1906, the defendant was arraigned and entered a plea of not guilty; thereupon a panel of six jurors were examined on their *voir dire*, and were challenged for cause both to the array and individually, which challenges were overruled by the court and a complete jury of six was sworn in chief to well and truly try and true deliverance make between the state of Florida and the defendant. Thereupon the defendant's counsel called the attention of the court to the fact that one of the witnesses named Harrison indorsed on the back of the information as a state witness was also a witness for the defense, and that such witness, who lived a few miles out from Jacksonville, where the trial was proceeding, was absent from the court room, and moved for time to get said witness. The court then ordered the facts so stated to be set forth in the form of an affidavit. The county solicitor thereupon moved the court that the jury be discharged from further consideration of the case, and that said cause be continued until the 16th of March. This motion of the county solicitor was granted by the court and the jury discharged.

On March 21, 1906, when the cause was again called for trial, the defendant, by leave of the court, withdrew his plea of not guilty and interposed a plea of former jeopardy, setting up the former proceedings above recited. To this plea the state interposed a demurrer, which demurrer was sustained by the court, upon which the defendant was put to trial before another jury, who returned the verdict of conviction to which the writ of error is addressed. The order sustaining the demurrer of the state to the defendant's plea of former jeopardy is assigned as error.

In this ruling the court below erred. The discharge of the former jury who had been charged with the defendant's case upon the arbitrary motion of the state's solicitor without any necessity or legal reason therefor, and without the consent of the defendant, amounted to an acquittal of the defendant, and his plea of former jeopardy should have been sustained, the state's demurrer thereto overruled, and the defendant discharged without day. It is true that the defendant had asked the court for time to procure the attendance of an absent witness, who resided a few miles from the court, but he did not ask for a continuance of the cause or for a discharge of the jury, and an arbitrary discharge of the jury under these circumstances without his consent amounted to his acquittal. His silence or failure to object or protest against the discharge of the jury did not constitute a consent or a waiver of his constitutional right. *State v. Richardson*, 47 S. C. 166, 25 S. E. Rep. 220, 35 L. R. A. 238. The power of the court to discharge a jury who have been sworn in chief before verdict should be

exercised only in case of a manifest, urgent, or absolute necessity.⁹ If the jury are discharged for a reason legally insufficient and without an absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded as a bar to any further trial or to any subsequent indictment. 12 Cyc. Law & Proc., p. 270, and citations; *Grant v. People*, 4 Parker's Cr. Rep. 527; *State v. Wamire*, 16 Ind. 357; *Teat v. State*, 53 Miss. 439; *Helm v. State*, 66 Miss. 537, 6 South. Rep. 322; *State v. McKee*, 1 Bailey's Law (S. C.) 651, 21 Am. Dec. 499, and cases cited in notes; *Cooley's Const. Lim.* (7th ed.), p. 467, where this great author says: "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impanelled and sworn." 1 Bishop's New Cr. Law, §§ 1013, 1014, *et seq.*; *State v. Robinson*, 46 La. Ann. 769, 15 So. Rep. 146; *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. Rep. 210; *People v. Cage*, 48 Cal. 323; *Ex parte Clements*, 50 Ala. 459; *Bell v. State*, 44 Ala. 393; *Ex parte Maxwell*, 11 Nev. 428; *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109, 15 Atl. Rep. 466; *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186; *Miller v. State*, 8 Ind. 325; *McCorkle v. State*, 14 Ind. 39; *State v. Callendine*, 8 Iowa 288; *Hines v. State*, 24 Ohio St. 134.¹⁰

Many other errors are assigned and argued, but as the error found completely disposes of the case, it becomes unnecessary to notice any other assignment. The judgment of the court below is hereby reversed with directions to overrule the state's demurrer to

⁹ The defense of former jeopardy is not sustained by the discharge of a jury in case of the death or illness of the judge or a juror. *Commonwealth v. Roby*, 29 Mass. 496; *In re Scrafford*, 21 Kan. 735; *Mason v. State*, 26 Ohio Circ. Ct. R. 535; or in case a juror becomes disqualified; *Armour v. State*, 125 Ga. 3, 53 S. E. 815; *Gardes v. United States*, 87 Fed. 172; 30 C. C. A. 596; or in case a juror becomes insane; *United States v. Haskell*, 4 Wash. C. C. 402, 2 Wheeler Cr. Cas. 101, Fed. Cas. No. 15321; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; or in case a juror becomes intoxicated; *State v. Tyson*, 138 N. Car. 627, 50 S. E. 456; or when the court in which the defendant was formerly acquitted, was without jurisdiction; *Commonwealth v. Peters*, 12 Metc. (Mass.) 387. In the latter case *Shaw, C. J.*, said (p. 397): "It being clear that the indictment against the defendant in the District Court of the United States for the same assault charged in this indictment, was not within the jurisdiction of that court, we may presume that the acquittal there was upon that ground, and not upon the merits. But whether it was so in fact or not, it is equally clear that no legal judgment could have been rendered on a conviction in that court, and therefore that an acquittal there is no bar to this indictment."

¹⁰ *Contra*, holding that jeopardy begins only after the rendition of a verdict. *Swindel v. State*, 32 Tex. 102; *Taylor v. State*, 35 Tex. 97; *United States v. Perez*, 9 Wheat. (U. S.) 579.

the defendant's plea of former jeopardy and to discharge the defendant without day at the cost of Duval County.

HOCKER and PARKHILL, J. J., concur.

SHACKELFORD, C. J., and COCKRELL, and WHITFIELD, J. J., concur in the opinion.

STATE v. HAGER.

1900. SUPREME COURT OF KANSAS. 61 Kans. 504, 59 Pac. 1080, 48 L. R. A. 254.

Appeal from Jackson District Court, Charles F. Johnson, judge.

DOSTER, C. J.¹¹—This is an appeal by the state upon a question reserved by it. The defendant in the court below interposed a plea of former jeopardy, which, upon hearing and consideration by the court, was sustained and an order made for his discharge. The defendant had been informed against for grand larceny. Upon the trial of his case the jury reported that they were unable to agree, whereupon they were discharged from further consideration of the case. The action was continued to the next succeeding term, and at that term the defendant filed his plea of former jeopardy. In this plea he alleged that, at the trial of his case at the preceding term, "the jury were arbitrarily discharged without a verdict from the consideration of the case, and without any sufficient or lawful reason therefor, to which discharge defendant excepted, and having once been in jeopardy he can not again be placed upon trial." The evidence in support of this plea was, of course, the record of the former proceeding. The material portion of the record was as follows:

"The said jury retired in charge of a sworn bailiff to consider of their verdict. And after being absent some time in consideration of their verdict they were duly returned to the jury-box and the court duly inquired of the foreman whether they had agreed upon a verdict, and was informed by said foreman that they had not. The court then inquired of said foreman, 'Is there any probability of your doing so?' and was answered by said foreman, 'There is not.' The jury was by the court thereupon discharged from the further consideration of the cause, because they were unable to agree upon a verdict."

* * * * *

The question now recurs, was the plea of the former jeopardy sustained by the record? It is undeniable that the arbitrary and unnecessary discharge of a jury before which an accused person is

¹¹ Part of the opinion is omitted.

tried, without a verdict, operates also to discharge the defendant. In such case, he has been once in jeopardy. That jeopardy, terminating without fault upon his part and from no overweening necessity, can not be renewed and the accused again called upon to defend himself. The civil code (Gen. Stat. 1897, ch. 95, § 291; Gen. Stat. 1899, § 4544) provides that "the jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing." The provisions of this section are made applicable to trials of criminal cases. (Gen. Stat. 1897, ch. 102, § 201; Gen. Stat. 1899, § 5458.) Authority for the discharge of a jury trying a criminal case, therefore, exists if "they have been kept together until it satisfactorily appears that there is no probability of their agreeing." The tribunal primarily entrusted with the duty of determining whether a jury has been kept together until there is no probability of their agreeing is the trial court. The question whether they have been so kept together and whether there is a probability of their agreeing are judicial questions. As such they can not be arbitrarily or capriciously determined by the court. The court must be satisfied that the jury in all probability can not agree to a verdict before it should order their discharge. However, when it does become of that conviction and enters it of record, the correctness of its view and the soundness of its conclusions are not subject to review, unless the record of its action discloses it to be in error. Unless the record discloses hastily formed conclusions, immature judgment, or capricious conduct, the action of the trial judge can not be reviewed by this or any other court.

In the *State v. Allen*, 59 Kans. 758, 54 Pac. 1060, the record of the former trial recited that "the jury not having agreed upon a verdict in the above-entitled cause, the jury is discharged from further consideration of this case." It was therefore held that the existence of no proper or necessary grounds for the discharge of the jury had been shown, but that something more should have appeared than that the jury had not agreed upon a verdict. It should have been shown that there was no probability of their agreeing. The present case, however, is different. Here, it appeared, not merely that the jury had failed to agree, but that, upon inquiry of the foreman in the presence of his fellows, he had stated that there was no probability of their being able to agree. This statement of the foreman, the usual spokesman of the panel, in the presence of the remainder of the jurors, and not dissented from by them, must be regarded as their conclusion as well as his. In addition to the inquiry addressed by the court and answered by the foreman, it appears from another recital of the record that the jury had "been absent some time in consideration of their verdict," before they

were again brought into the presence of the court. How long they had been absent does not appear, but we must indulge the presumption that it had been for such a length of time as to enable the court to regard it as some evidence of inability to reach a conclusion. The record further shows, in connection with its recitals of absence of the jury for "some time in consideration of their verdict," and inquiry and answer as to the probability of an agreement, that the jurors were thereup discharged "because they were unable to agree upon a verdict." It would appear, therefore, that the court acted according to judicial methods in discharging the jury. He took into consideration the length of time, whatever that may have been, that the jury had been in consideration of their verdict, and the statement of the foreman in the presence of the remainder of the jury, and presumably assented to by them, because not dissented from, that they were unable to agree upon a verdict. From these facts he evidently deduced the conclusion that there was no reasonable probability of their being able to agree. While the record of the proceedings was not made as full as such records ought to be made, yet it is sufficiently full to prevent us from saying that the court below erred.

While in the *State v. Allen*, *supra*, it was held that the court had erroneously discharged the jury under the particular circumstances of that case, as disclosed by the record, yet the rule was distinctly announced that "the length of time a jury should be kept together and the probability of an agreement must be determined by the trial court from the facts and circumstances of the particular case, and its decision will be conclusive unless it has abused its discretion in that regard." This statement of the rule is in harmony with the holdings of nearly all the cases. Mr. Bishop says: "The result (of the authorities) would seem to be that when he (the judge) concurs in and affirms the jury's conclusion of inability to agree, and discharges them, the fact so found, the existence whereof nullifies the seeming jeopardy, is absolute and irreversible." (1 Bish. New Cr. L., § 1041.) An instructive and valuable case, reviewing many of the decisions upon the subject and showing the rule to be as above stated by Mr. Bishop, and also as herein stated, is *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822.

We think the plea of former jeopardy was improperly sustained. The judgment of the court below sustaining it is therefore reversed, with directions to proceed with the trial of the case.¹²

¹² See *People ex rel Stabile v. Warden of Prison*, 202 N. Y. 138, 95 N. E. 729.

McNULTY v. STATE.

1903. SUPREME COURT OF TENNESSEE. 110 Tenn. 482,
75 S. W. 1015.

Appeal in error from the Criminal Court of Shelby County. John T. Moss, judge.

Mr. JUSTICE SHIELDS delivered the opinion of the court.¹⁸

Charles McNulty, plaintiff in error, upon his plea of guilty to a warrant issued by a justice of the peace of Shelby county, January 15, 1903, charging him with assault and battery upon one Cottrell Childress upon a previous day of that month, was fined \$50, and committed to the workhouse. Childress died about 30 days thereafter from the injuries sustained from the assault and battery committed upon him, and the plaintiff in error was indicted for his murder in the criminal court of Shelby county, and upon trial was found guilty of voluntary manslaughter, and his punishment fixed at two years in the state penitentiary.

After the state had closed its case, and the plaintiff in error had been examined as a witness in his own behalf, his counsel tendered to the court a plea stating the proceedings before the justice of the peace, and relying upon them, and the judgment there given against the plaintiff in error, as a former conviction, in bar of the indictment under which he was then being tried, without any affidavit explaining why it was not tendered at the proper time. The trial judge refused to allow the plea to be filed, and directed the trial to proceed upon the plea of not guilty. This action is now assigned as error.

There was no error in the refusal of the trial judge to allow the plea tendered to be filed. It should have been tendered, along with the plea of not guilty, before the trial was begun; and not having been tendered until the state had closed the evidence in its behalf, and the plaintiff in error was introducing his, and the delay not being satisfactorily explained, it was within the discretion of the court to refuse permission for it to be then filed. But the action of the trial judge was correct upon the merits. The plea did not set forth a meritorious and valid defense to the indictment. The facts stated in it did not show that the plaintiff in error had once been in jeopardy for the offense for which he was then being tried—the murder of Cottrell Childress. The proceeding had against him was for a misdemeanor—assault and battery.

The indictment in this case is for a felony—murder committed upon Cottrell Childress—a greater offense, containing other and materially different elements from the former one, and requiring

¹⁸ Part of the opinion is omitted.

different proof to convict, and which had not been committed and was not in existence when the first trial was had, Childress being then alive. The two offenses are entirely distinct, and the identity necessary to sustain a plea of the former conviction is wholly wanting.

It is well-settled law that a conviction of a misdemeanor included in a felony is no bar to a prosecution for the felony, and certainly this rule must prevail when the felony is not consummated until after the conviction of the misdemeanor, as was the murder in this case by the death of the assaulted party after the judgment before the justice of the peace. *Mikels v. State*, 3 Heisk. 321; *Clark's Crim. Prac.*, pp. 402, 403.

* * * * *

The failure to file a plea at the proper time being unexplained, and no merit being shown, the assignment of the error is overruled, and the judgment affirmed.¹⁴

STATE v. ALBERTSON.

1893. SUPREME COURT OF NORTH CAROLINA. 113 N. Car. 633,
18 S. E. 321.

Indictment for an affray with a deadly weapon and serious injury, tried before Bryan, J., and a jury, at August term, 1893, of DUPLIN Superior Court.

The facts are sufficiently stated in the opinion of Associate Justice CLARK.

From the judgment on a verdict of "guilty" the defendant, Albertson, appealed.

CLARK, J.—The indictment charges an affray, in that the defendant and one Maready did beat and wound each other with deadly weapons. The defendant, Albertson, pleaded former conviction. It was admitted that he had been tried before a justice of the peace and punished for a simple assault. The evidence, on the trial before the Superior Court, as before the justice, showed that he had used no deadly weapon and inflicted no serious injury, though Maready, whom the jury acquitted, had. Upon this evidence the plea of former conviction should have been sustained.

In *State v. Coppersmith*, 88 N. C. 614, the indictment charged that each of the parties indicted for an affray had used a deadly weapon. The evidence showed that Coppersmith was guilty only of

¹⁴ See *People v. McDaniels*, 137 Cal. 192, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. 81, holding that a conviction of battery is a bar to a prosecution for assault with intent to commit murder.

a simple assault. The court below thereupon held that it had no jurisdiction as to him. This was overruled on appeal. The reason for this more fully appears in *State v. Ray*, 89 N. C. 587 (and subsequent cases affirming it), which is, that the charge of using a deadly weapon confers jurisdiction, and that the court, being a court of general jurisdiction, will not dismiss the action upon it appearing that only a simple assault had been committed. The court, in such cases, will proceed to judgment, though of course it can not impose a sentence beyond the limit for a simple assault when tried before a justice of the peace. *State v. Johnson*, 94 N. C. 863; *State v. Nash*, 109 N. C. 824.

Here an assault with a deadly weapon is charged. The proof as to Albertson is of a simple assault. The conviction could only be for a simple assault. It is admitted that Albertson had been tried and punished for that. He can not be punished again. It was error to overrule the plea of former conviction. *State v. Price*, 111 N. C. 703.

An affray is a mutual fighting, and an indictment therefor is a charge against each person. One may be acquitted and the other convicted of an assault, or one may be found guilty of an assault with a deadly weapon and the other of a simple assault. If convicted of the latter, a former conviction or acquittal therefor before a justice of the peace is a complete defense, though of course a judgment before a magistrate would not be a defense when, in the subsequent trial in the superior court, it appears that the defendant pleading former conviction (or acquittal) had, in fact, used a deadly weapon or inflicted serious injury. *State v. Huntley*, 91 N. C. 617; *State v. Shelly*, 98 N. C. 673. In such case, the justice not having jurisdiction, the proceedings before him would be a nullity.¹⁵

PEOPLE v. DEVLIN.

1904. SUPREME COURT OF CALIFORNIA. 143 Cal. 128, 76 Pac. 900.

Appeal from a judgment of the Superior Court of Alameda county from an order denying a new trial. John Ellsworth, judge.

The facts are stated in the opinion.

COOPER, C. J.—In this case the defendant was charged with burglary, alleged to have been committed on the seventeenth day of

¹⁵ See *State v. Gleason*, 56 Iowa 203, 9 N. W. 126, holding that a conviction of petit larceny before a justice of the peace is a bar to a subsequent prosecution for larceny from the person; see also *Bryant v. State*, 72 Ind. 400; *Southworth v. State*, 42 Ark. 270, and *Boswell v. State*, 20 Fla. 869.

January, 1903, by feloniously entering a building with intent to commit larceny. He was found guilty, and appeals from the judgment and the order denying his motion for a new trial. Defendant pleaded that he had been once in jeopardy for the offense charged in the information. He offered in evidence the judgment roll in a former conviction of petit larceny for the stealing and carrying away certain personal property on the same occasion, and after he had entered the building described in the information.

The court sustained the objection of the prosecution on the ground that the conviction of petit larceny, committed during the same transaction, and immediately after entering the building, is not a bar to a charge of burglary. This presents the sole and only question in the case.

The plea of once in jeopardy, to be good, must be for the offense charged in the information. (Pen. Code, § 1017, subd. 4.) Burglary is the entering of a building or structure with intent to commit grand or petit larceny or any felony. (Pen. Code, § 459.) Larceny is the felonious stealing or carrying away the personal property of another. (Pen. Code, § 484.) It is evident that one can commit burglary by entering a building with intent to commit any felony, such as rape, robbery, arson, or murder. It is also evident that the crime consists of the entry with the intent set forth in the statute. After one has entered a building with intent to commit any other felony than grand or petit larceny, he has committed burglary; but he may then find that it is impossible, for various reasons, to commit the felony which it was his intention to commit when he entered, and conclude to commit larceny by stealing some article of value in the building. He thus, in rapid succession, commits two crimes. Indeed, after he has committed burglary he might under favorable circumstances commit any felony named in the statute. He might commit rape, and in such case he would be guilty of burglary and also of rape. Therefore we conclude that the evidence did not show, nor tend to show, that defendant had been before in jeopardy for burglary. The legislature, no doubt, "may pronounce as many combinations of things as it pleases criminal, resulting not infrequently in a plurality of crimes in one transaction, or even in one act, for any one of which there may be a conviction without regard to the others." (1 Bishop's New Criminal Law, Vol. 1, § 1060, and cases cited.) The same author says (*id.* 1062): "If in the night a man breaks and enters a dwelling-house to steal therein, and steals, he may be punished for two offenses, or one, at the election of the prosecuting power. * * * Therefore a jeopardy on an indictment charging the burglary as committed by breaking and entering with intent to steal is no bar to a prosecution for the actual theft." It was said by this court in *People v. Garnett*, 29 Cal. 628: "Larceny is not necessarily included in burglary, like manslaughter in murder, within the sense

of the statute. On the contrary, it is no part of it. The offense of burglary is complete without any larceny being committed. The relation contemplated by the statute does not exist between burglary and such other felony, if any, as may chance to be committed by the defendant at the same time."

The above case was cited with approval in *People v. Curtis*, 76 Cal. 57, and while the rule has been held different in some jurisdictions, the great weight of authority is to the effect herein stated. (*Wilson v. State*, 24 Conn. 57; *State v. Warner*, 14 Ind. 572; *State v. Martin*, 76 Mo. 337; *Gordon v. State*, 71 Ala. 315; *Howard v. State*, 8 Tex. App. 447; *Territory v. Willard*, 8 Mont. 329.) The views herein expressed are not in conflict with *People v. McDaniels*, 137 Cal. 192 (92 Am. St. 81, and note). It was there held that, upon a charge of assault with intent to commit murder, a prior conviction of battery, growing out of the same identical facts, was a bar. The court said: "It is well settled that a conviction of a lower offense embraced in a higher one, for the commission of which a defendant was tried, is an acquittal of the higher offense." In the case at bar the offense of larceny, of which defendant was previously convicted, is not embraced in the charge of burglary, of which he was convicted in this proceeding. Therefore the case relied upon is not in point.

We advise that the judgment and order be affirmed.

GRAY, C., and SMITH, C., concurred.

For the reasons given in the forgoing opinion, the judgment and order are affirmed. HENSHAW, J.; MCFARLAND, J.; LORIGAN, J.

COMMONWEALTH v. CLAIR.

1863. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 89 Mass. 525.

Indictment for embezzling sixteen Melton cloth overcoats, the property of David M. Hodgdon.

At the trial in the superior court, before Ames, J., the defendant pleaded in bar a previous acquittal upon the same charge; and it was admitted, on the part of the Commonwealth, that the defendant had been duly tried and acquitted on an indictment charging him with embezzling a quantity of Melton cloth, lasting, velvet, flannel, wadding, and other materials used in making overcoats, the property of said Hodgdon, which had been delivered to the defendant to be made into overcoats; and that the present indictment was for the same crime intended to be covered by the first indictment. The principal facts which appeared in both cases were, that Hodgdon delivered the materials to the defendant as aforesaid, and that

several overcoats were made up and returned, but the work proved unsatisfactory and they were redelivered for completion to the defendant, who subsequently did the acts relied upon as proof of the embezzlement.

The judge overruled the plea in bar, and the defendant alleged exceptions.

BIGELOW, C. J.—The obvious and decisive answer to the defendant's plea in bar of the *autrefois* acquit is, that the first indictment charges a different offense from that set out in the indictment on which the defendant is now held to answer. The principle of law is well settled that, in order to support a plea of *autrefois* acquit, the offenses charged in the two indictments must be identical. The test of this identity is, to ascertain whether the defendant might have been convicted on the first indictment by proof of the facts alleged in the second. The question is not whether the same facts are offered in proof to sustain the second indictment as were given in evidence on the trial of the first; but whether the facts are so combined and charged in the two indictments as to constitute the same offence. It is not sufficient to say, in support of a plea of *autrefois* acquit, that the transaction or facts on which the two indictments are based are the same. It is necessary to go further, and to ascertain and determine whether they are so alleged in the two indictments as to constitute not only the same offense in degree or kind, but also that proof of the same facts offered to sustain the second indictment would have well supported the first. The *King v. Vandercomb*, 2 Leach (4th ed.) 708; *Commonwealth v. Roby*, 12 Pick. 496, 500; *Commonwealth v. Wade*, 17 Pick. 400. The last case affords an apt illustration of the practical application of the rule. The defendant was indicted for burning a dwelling-house by setting fire to the barn of A and B. The evidence showed that it was the barn of A. and C. This variance in the description of the offense was held to be fatal, and the defendant was acquitted. He was subsequently indicted for burning the same house by setting fire to the barn of A and C. On a plea of *autrefois* acquit, it was held that the previous acquittal on the first indictment was no bar. The facts offered in support of the two indictments were the same, but different offenses were charged in them. The averment of property in the barn was material, and, this fact being alleged differently in the two indictments, they were not for the same offense either in form or substance. So in the case at bar. The defendant was first indicted for embezzling cloth, velvet, flannel, and other materials of which overcoats were made. This indictment would not have been supported, if it appeared that, at the time when the alleged embezzlement was committed by the defendant, these articles no longer existed separately, but had been used and converted into garments properly called and known as overcoats. There would have been in such case a material variance in

the description of the articles embezzled; the evidence would not have corresponded with the allegation in the indictment of embezzling cloth and other materials, and the defendant would have been rightly acquitted on that ground. It is common learning, that in indictments for larceny, embezzlement and kindred offenses, the description of the property which forms the subject of the offense must be proved as laid. A person indicted for stealing shoes can not be convicted by proof that he had stolen boots; nor is an indictment for stealing a sheep, which by legal implication avers that the animal was alive when stolen, supported by evidence that it was in fact dead when feloniously taken. If an article has obtained in common parlance a particular name, it is erroneous to describe it by the name of the material of which it is composed. Archb. Crim. Pl. (5th Amer. ed.) 48; Roscoe's Crim. Ev. (5th ed.) 203; *Rex v. Edwards*, Russ. & Ry. 497; *Rex v. Halloway*, 1 C. & P. 128; *Regina v. Mansfield*, Car. & M. 140.

In the second indictment the defendant is charged with embezzling overcoats. This is a different offense from that charged in the first indictment. Nor would the evidence which would be sufficient to support it have warranted a conviction on the charge of embezzling the materials of which the coats were made. He has therefore been acquitted of a different offense from that now charged again him. Such acquittal is no bar to the present indictment.

Exceptions overruled.¹⁶

STATE v. HOWE.

1895. SUPREME COURT OF OREGON. 27 Ore. 138, 44 Pac. 672.

Appeal from Jackson County Circuit Court. Hicro K. Hanna, judge.

The defendant, W. E. Howe, who was treasurer of Klamath county from July 6, 1892, to July 6, 1894, was, on November 14, 1894, indicted for the crime of larceny of public money, alleged to have been committed on January 23, 1893, by converting to his own use the sum of fifty-two dollars of the county funds which came into his possession and which he held by virtue of his office. Upon this indictment he was tried and acquitted. On the 15th of November, 1894, another indictment was returned against him in which it was alleged that at the expiration of his term of office he

¹⁶ An acquittal on an indictment for larceny of the property of A is not a bar to a subsequent indictment for larceny of the property of B, misdescribed in the first indictment as the property of A. *Riffe v. Commonwealth*, 21 Ky. L. 1331, 56 S. W. 265; *Davidson v. State*, 40 Tex. Cr. R. 285, 49 S. W. 372, 50 S. W. 365; *Carter v. Commonwealth*, 25 Ky. L. 688, 76 S. W. 337; *State v. Williams*, 45 La. Ann. 936, 12 So. 932.

had in his possession as treasurer the sum of eight thousand dollars of the public moneys of the county, and that he "did then and there fraudulently and feloniously steal, make way with, and convert to his own use, the said eight thousand dollars, and then and there neglected and refused to pay over the said sum of eight thousand dollars, or any part thereof, to his successor in office, as by law directed and required." When called upon to plead to this indictment, in addition to the plea of not guilty, he pleaded his acquittal under the former indictment as a bar to this prosecution, and at the trial offered in evidence the record of the proceedings therein, and it having been excluded, he again presented the same record, accompanied by an offer to show that the fifty-two dollars mentioned therein was a part of the eight thousand dollars which it is charged in the second indictment he failed to pay over to his successor. This was also excluded, and these rulings of the trial court present the important question in this case. Affirmed.

Opinion by Mr. CHIEF JUSTICE BEAN.¹⁷

It is a principle as old as the common law itself, and which has been firmly imbedded in the jurisprudence of nearly every state of the Union by constitutional provision, that "No person shall be put in jeopardy twice for the same offense." It is upon this principle that the pleas of former acquittal and of former conviction are allowed in criminal cases. "The right not to be put in jeopardy a second time for the same cause is as sacred as the right of trial by jury, and is guarded with as much care by the common law and by the constitution." BLACK, C. J., in *Dinkey v. Commonwealth*, 17 Pa. St. 126. But the solution of the question as to what facts will sustain the plea is attended with difficulty, and has provoked much discussion by the courts and text writers. The general rules upon the subject and the tests usually applied are well settled, but in the method of their application much contrariety of opinion appears, owing, no doubt, to the generality and consequent elasticity of the rules themselves. We do not propose at this time to enter upon any elaborate discussion of the question, but, having examined all the authorities cited in the briefs of counsel, and as many others bearing upon the question as were within our reach, we shall proceed to state our view of the law applicable to the facts in this case. All the writers seem to concur that a plea of former conviction or acquittal must be "upon a prosecution for the same identical act and crime." 4 Blackstone's Commentaries, 336. "But," as said by Chitty, page 455, "it is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one would show that the defendant could not have been guilty of the other." We are therefore to determine whether the charges in the two indictments in question

¹⁷ Part of the opinion is omitted.

are for the same identical act and offense, or, applying the test of Mr. Chitty, whether the acquittal of the crime charged in the first indictment shows that the defendant could not have been guilty of the crime charged in the second.

1. It is first contended that the defendant could have committed but one crime violating any of or all the provisions of § 1772, Hill's Code, and that after the expiration of his term of office he could be prosecuted on only one indictment for a violation of such provisions, even though it embraced all the enumerated acts; and hence the prosecution under the first indictment charging the crime to have been committed by the conversion of fifty-two dollars in January, 1893, was a bar to another indictment charging him with having converted to his own use and failed to pay over eight thousand dollars at the expiration of his term, eighteen months later. This argument proceeds on the theory that the crime is under the statute necessarily a continuing offense, commencing with the first taking or misappropriation of money while in office, and ending with the failure to account for or turn over the balance in his hands to his successor at the expiration of his term. It is settled that when embezzlement is committed by means of a series of connected transactions, a charge that the crime was committed on a certain day will cover and admit evidence of the whole (*State v. Reinhart*, 26 Ore. 466, 38 Pac. 822), but when the acts constituting the crime are separate and distinct, so that the prosecution can allege and prove one distinct act which renders the offense complete, it is ordinarily to be held to the general rule that the proof must correspond with the crime charged in the indictment. See *Edelhoff v. State* (Wyo.), 36 Pac. 627, for a well considered discussion of this question. It seems to us plain that the statute defining the crime of larceny of public money clearly specifies three separate and distinct acts, the commission of either of which will constitute the crime, to-wit, (1) conversion by the party having the same in possession; (2) loaning with or without interest; (3) neglecting or refusing to pay over as by law directed or when lawfully demanded (Hill's Code, § 1772); and unless two or more of these enumerated acts are in truth only successive steps in one appropriation they will each constitute a full statutory offense. They are enumerated in the statute in the disjunctive, are of equal legal import, and prima facie each charge is a separate offense. From this it necessarily follows that a prosecution for a crime committed in either of the three ways mentioned will not bar a prosecution for one committed in either of the other two, unless it be for the same identical act. A defendant could not of course be tried for converting public money to his own use, and afterwards prosecuted for failing to pay over the same money as by law directed or required; or, e converso, he could not be tried for failing to pay over public money as by law required, and afterwards prosecuted for

converting the same money to his own use. But the fact that he had been indicted and tried for converting a specific sum of money at a certain date during the term of his office would not bar a prosecution for failing to pay over money in his hands at the expiration of his term, unless it further appeared that both grew out of the same identical act or transaction, and were for the same offense. Thus, if the defendant was tried for converting certain money to his own use, and the prosecution failed because the money did not in fact belong to the county, such trial would be a bar to a prosecution for failing to pay the same money over to his successor in office, because it would be for the same act or offense; but if he was acquitted because in fact he had not converted the money, but still had it in his official capacity, such acquittal would not bar a subsequent prosecution for failing to pay the same money over at the expiration of his term, for the reason that the offenses charged are different, and grow out of a violation of separate provisions of the statute.

Many tests have been announced by which the question as to when the offense is the same can be determined, but their application must necessarily depend largely upon the facts of each particular case. For instance, it is often said and stated as a test that a conviction or acquittal upon one indictment is a bar to a subsequent prosecution upon another, when the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, and this is the rule principally relied upon by the defendant in this case. But it must be accepted with some qualification, and as true only in a general sense. Thus, if after a conviction of assault and battery, the injury resulted in death, the defendant, it is held, may be prosecuted for manslaughter or murder, although, under the facts set out in the second indictment, he might have been convicted of the crime charged in the first: 1 Bishop's New Crim. Law, § 1059. So, too, in prosecutions for the unlawful sale of intoxicating liquors, each sale constitutes a separate offense, and although both indictments charge a sale to the same person, and the prosecution could support either by the same evidence, inasmuch as the date is immaterial, yet a prosecution on one would not be a bar to the other, unless it was for the same act of selling. *State v. Ainsworth*, 11 Vt. 91. So also where each obstruction of a highway by a railway company constitutes a distinct offense, an acquittal on the trial of one indictment is not ipso facto a bar to another, found at the same time and charging the same character of offense as having been committed on the same date, although the same evidence would have supported a conviction on either at the election of the prosecution. But in such case it is only a bar to a prosecution for such offense as was proven or attempted to be proven on the trial of the first indictment. *Chesapeake Railway Company v. Commonwealth*, 88 Ky. 368 (11 S. W.

87). So, then, it can not be said that the rule suggested affords an infallible guide.

Another rule sometimes adopted is that the conviction or acquittal on one indictment will be a bar to another prosecution growing out of the same transaction. But this also must be taken as true in a general sense. A single act or transaction may be an offense against two statutes or against the law of two different jurisdictions, in which case one prosecution will not bar the other. *State v. Stewart*, 11 Ore. 238 (4 Pac. 128); *Morey v. Commonwealth*, 108 Mass. 433. The question is not so much whether the defendant has been tried for the same act, or whether the facts alleged in the second indictment would have warranted a conviction on the first, as it is whether he has been put in jeopardy for the same offense, or some part or constituent element thereof, and the rules to be found in the books are only means for the determination of that question. As said by the learned editor of the *American Decisions* in an exhaustive and very instructive note to *Roberts v. State*, 58 Am. Dec. 537, "The offenses charged in the two indictments must be substantially the same, or, as we shall see, they must be of the same nature or the same species, so that the proof of one involves the proof of the other, or such that one is a part or constituent element of the other." Now, the two indictments against the defendant in this case were not for the same offense, *prima facie*, nor did the proof of one necessarily involve the proof of the other, nor did an acquittal on the first necessarily show that the defendant could not have been guilty of the crime charged in the other, and hence such acquittal was not a bar to a prosecution on the second indictment, unless the defendant had shown that they were both for the same identical act, which he did not do. The fact, if it was a fact, that the fifty-two dollars which he was accused of converting to his own use in January, 1893, but which the jury found he did not convert, was a part of the eight thousand dollars which the jury found he did not turn over to his successor eighteen months afterwards, would certainly not make the first acquittal a bar to the second indictment, without additional proof that the failure to turn over was on account of the same identical act which it was charged constituted conversion in 1893, for such acquittal did not in any way tend to show that he was not guilty of the crime charged in the second indictment. We think, therefore, that the trial court committed no error in excluding the testimony offered. * * * It follows that the judgment of the court below must be affirmed. Affirmed.

CHAPTER III.

CLASSIFICATION OF CRIMES.

BANNON ET AL v. UNITED STATES.

1895. SUPREME COURT OF THE UNITED STATES. 156 U. S. 464,
39 L. ed. 494.

Mr. JUSTICE BROWN, after stating the case, delivered the opinion of the court.¹

This case is before us upon certain assignments of error, the principal ones of which relate to the sufficiency of the indictment.

1. The indictment is claimed to be fatally defective, in that it fails to allege that the defendants feloniously conspired to commit the offense in question. The language of the indictment in this particular is as follows: That the defendant did, "with divers other evil-disposed persons, to the grand jury unknown, unlawfully, wilfully, knowingly, and maliciously conspire, combine and confederate together and with each other to wilfully, knowingly, unlawfully, and maliciously commit an offense against the United States, to-wit: the offense and misdemeanor of knowingly and unlawfully aiding and abetting the landing in the United States, and in the state of Oregon, and in the district of Oregon, and within the jurisdiction of this court, from a vessel, to-wit: the steamship Wilmington and the steamship Haytian Republic, both steamships plying between the port of Portland, Oregon, and Vancouver, in the province of British Columbia, Dominion of Canada, Chinese persons, to-wit, Chinese laborers not lawfully entitled to enter the United States, by furnishing such Chinese laborers false, fraudulent, and pretended evidence of identification, and by counselling, advising, and directing said Chinese laborers and furnishing them information and advice touching the questions liable to be asked them upon their application for permission to land from said vessels, and by various other means to the grand jury unknown." Following this is a specification of certain acts done by several of the conspirators, including Bannon, but not including Mulkey.

The statute alleged to have been violated is Rev. Stat., § 5440,

¹ The statement of facts and part of the opinion are omitted.

as amended by the act of May 17, 1879, c. 8, 21 Stat. 4: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court." Defendants' argument in this connection is that, inasmuch as this court held in *Mackin v. United States*, 117 U. S. 348, that a crime punishable by imprisonment in the state prison or penitentiary, with or without hard labor, is an infamous crime as known to the federal constitution, it necessarily follows that such an offense is a felony, and hence, that the indictment is defective, in failing to aver that the conspiracy was feloniously entered into.

That a conspiracy "to commit *any* offense against the United States" is not a felony at common law, is too clear for argument; and even if it were made a felony by statute, the indictment would not necessarily be defective for failing to aver that the act was feloniously done. This was the distinct ruling of this court in *United States v. Staats*, 8 How. 41, wherein, under an act of Congress declaring that if any person should transmit to any officer of the government, any writing in support of any claim, with intent to defraud the United States, knowing the same to be forged, such person should be adjudged guilty of felony, it was held to be sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a felonious intent. In the opinion it was admitted that, in cases of felonies at common law, and some also by statute, the felonious intent was deemed an essential ingredient, and the indictment would be defective, even after verdict, unless such intent was averred; but it was held that, under the statute in question, the felonious intent was no part of the description, as the offense was complete without it, and that the felony was only a conclusion of law, from the acts done with the intent described, and hence was not necessary to be charged in the indictment. Where the offense is created by statute, and the statute does not use the word "feloniously," there is a difference of opinion among state courts whether the word must be put into the indictment. 1 Bish. Crim. Proc., § 535. But under the decision in the *Staats* case, we are clearly of the opinion that it need not be done.

Neither does it necessarily follow that because the punishment affixed to an offense is infamous, the offense itself is thereby raised to the grade of felony. The word "felony" was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded according to the degree of guilt. 4 Bl. Com.

94, 95; 1 Russell on Crimes, 42. Certainly there is no intimation to the contrary in Mackin's case, which was put wholly upon the ground that, at the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment were made the sole test of felonies, it would necessarily follow that a great many offenses of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offenses under the internal and customs revenue law, would be treated as felonies, and the persons guilty of such offenses stigmatized as felons. The cases of Wilson (114 U. S. 417) and Mackin (117 U. S. 348) prescribed no new definition for the word "felony," but secured persons accused of offenses punishable by imprisonment in the penitentiary, against prosecution by information, and without a preliminary investigation of their cases by a grand jury. By statute in some of the states, the word "felony" is defined to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the state prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender. *Ex parte Wilson*, 114 U. S. 417, 423. * * *

The judgment of the court below is, therefore, affirmed.²

² Crimes were divided at common law into treason, felony and misdemeanor. High treason consisted of levying war against the sovereign, compassing his death, adhering to or aiding his enemies, and other offenses against him (see IV Black. Com. 76 et seq.); petit treason consisted of the murder of a husband by a wife, a master by a servant, or of one superior in rank by his inferior. Treason in the United States is defined in the United States Constitution, Art III, Sec. 3, and consists only of levying war against the nation, adhering to its enemies, or giving them aid.

Felony is defined in Russell on Crimes, VI. ed. 192, as follows: "The term felony appears to have been long used to signify the degree or class of crime committed, rather than the penal consequence of forfeiture occasioned by the crime, according to its original signification. The proper definition of it, however, as stated by an excellent writer, recurs to the subject of forfeiture, and describes the word as signifying an offense which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment may be superadded according to the degree of guilt. Capital punishment does by no means enter into the true definition of felony; but the idea of felony is so generally connected with that of capital punishment that it is hard to separate them; and to this usage the interpretations of the law have long conformed." Of misdemeanor Russell says: "The word misdemeanor, in its usual acceptation, is applied to all those crimes and offenses for which the law has not provided a particular name; and they may be punished, according to the degree of the offense, by fine or imprisonment, or both. A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanor comprehending all indictable offenses which do not amount to felony as perjury, battery, libels, conspiracies and public nuisances."—

CHAPTER IV.
THE CRIMINAL ACT.

Section 1. Concurrence of Act and Intent.

DUGDALE v. REGINA.

1853. QUEEN'S BENCH. 1 Ellis & B. 435.

The defendant was indicted at the Middlesex Sessions.¹

LORD CAMPBELL, C. J.—We have decisions on both sets of counts. *Rex v. Heath* shows that those counts can not be supported which merely charge a possession with intent to publish. The mere intent can not constitute a misdemeanour when unaccompanied with any act. The case is precisely in point. But, as to the counts which charge a procuring with intent to publish, we find that in *Rex v. Fuller*, in Easter term, 1816, all the judges were of opinion that the procuring counterfeit coin with intent to utter was a misdemeanour, and that this might be evidenced by the possession. Must not the law be the same as to the publication of indecent prints? The circulation of counterfeit coin is a statutory offense; the circulation of indecent prints is punished at common law for the protection of morals. The procuring of such prints is an act done in the commencement of a misdemeanour, the misdemeanour being the wicked offence of publishing obscene prints.

COLERIDGE, J.—I am of the same opinion. The law will not take notice of an intent without an act. Possession is no such act. But procuring, with the intent to commit the misdemeanour, is the first step towards the committing of the misdemeanour.

WIGHTMAN, J.—I concur on both points. Mr. Metcalfe has clearly shown that the possession is not indictable, as not being an act; but the procuring is an act.

CROMPTON, J.—*Rex v. Fuller*, Russ. & R. 308, is a distinct authority. Judgment on the first and corresponding counts affirmed.

STATE v. RIDER.

1886. SUPREME COURT OF MISSOURI. 90 Mo. 54, 1 S. W. 825.

HENRY, C. J.²—At the September term, 1895, of the Saline Criminal Court the defendant was indicted for murder for killing one

¹ The statement of facts and arguments of counsel are omitted.

² Arguments of counsel and part of the opinion are omitted.

R. P. Tallent, and was tried at the November term of said court, 1885, and convicted of murder in the first degree. From that judgment he has appealed to this court.

The evidence for the state proved that he killed the deceased, and of that fact there is no question. It also tended to prove that he armed himself with a gun, and sought the deceased with the intent to kill him.

* * * * *

The court, for the state, instructed the jury as follows:

"The court instructs the jury, that if they believe from the evidence that prior to the killing of the deceased, the defendant prepared and armed himself with a gun, and went in search of, and sought out, deceased, with the intention of killing him, or shooting him, or doing him some great bodily harm, and that he did find, overtake, or intercept, deceased, and did shoot and kill deceased while he was returning from the river to his home, then it makes no difference who commenced the assault, and the jury shall not acquit the defendant; and the jury are further instructed that in such case they shall disregard any and all testimony tending to show that the character or reputation of deceased for turbulence, violence, peace and quiet was bad, and they shall further disregard any and all evidence of threats made by deceased against the defendant."

The mere intent to commit a crime is not a crime. An attempt to perpetrate it is necessary to constitute guilt in law. One may arm himself with the purpose of seeking and killing an adversary, and may seek and find him, yet, if guilty of no overt act, commits no crime. It has been repeatedly held in this and nearly every state in the Union, that one against whom threats have been made by another is not justifiable in assaulting him unless the threatener makes some attempt to execute his threats. A threat to kill but indicates an intent or purpose to kill; and the unexpressed purpose or intent certainly affords no better excuse for an assault by the person against whom it exists than such an intent accompanied with a threat to accomplish it. The above instruction authorized the jury to convict the defendant even though he had abandoned the purpose to kill the deceased when he met him, and was assaulted by deceased and had to kill him to save his own life. It does not follow because appearance would have excused deceased had he killed the accused, that the accused had no right to defend his life against the deceased, if in fact at the time he had made no assault upon the deceased and intended none. * * *

For the errors above noted, the judgment is reversed, and cause remanded. All concur.

UNITED STATES v. FOX.

1877. SUPREME COURT OF THE UNITED STATES. 95 U. S. 670,
24 L. ed. 192.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

In November, 1874, the defendant filed a petition in bankruptcy in the District Court for the Southern District of New York. In March, 1876, he was indicted in the Circuit Court for that district for alleged offences against the United States, and, among others, for the offence described in the ninth subdivision of § 5132 of the Revised Statutes, which provides that "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretence of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment, among other things, charged the defendant with having, within three months previous to the commencement of his proceedings in bankruptcy, purchased and obtained on credit goods from several merchants in the city of New York, upon the pretence and representation of carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing; whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for cost, and to other parties at auction for less than cost, and that these pretences and representations were made to defraud the parties from whom the goods were purchased.

The defendant was convicted; and, upon a motion in arrest of judgment, the judges holding the Circuit Court were opposed in opinion, and have certified to this court the question upon which they differed. That question is thus stated in the certificate:

"If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretenses, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

Mr. JUSTICE FIELD delivered the opinion of the court.

The question presented by the certificate of division does not appear to us difficult of solution. Upon principle, an act which is

not an offense at the time it is committed can not become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretences is made an offence against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done; it can not be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offence, one act being auxiliary to another in carrying out the criminal design. But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another.

There is no doubt of the competency of congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized "to establish uniform laws on the subject of bankruptcies throughout the United States," it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of congress. Any act committed with a view of evading the legislation of congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States. But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, can not be made an offence against the United States, unless it have some relation to the execution of a power of congress, or to some matter within the jurisdiction of the United States.

An act not having any such relation is one in respect to which the state can alone legislate.

The act described in the ninth subdivision of § 5132 of the Revised Statutes is one which concerns only the state in which it is committed; it does not concern the United States. It is quite pos-

sible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we can not supply qualifications which the legislature has failed to express.

Our answer to the question certified must be in the negative; and it will be so returned to the circuit court.

Section 2.—The Act Must be Contrary to Law When Committed.

COMMONWEALTH v. MARSHALL.

1831. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
28 Mass. 350, 22 Am. Dec. 377.

At April term, 1831, of this court, in the county of Franklin, the defendants were indicted for a misdemeanor in disinterring a dead body on the 20th of February of the same year, *contra formam statui*. The defendants pleaded *nolo contendere*, and afterwards moved in arrest of judgment, for the following reasons: (1) because the offence charged in the indictment is therein stated to have been committed in violation of the statute passed March 2, 1815 (St. 1814, c. 175), which was repealed by the statute of February 28, 1831 (St. 1830, c. 57), without any saving or excepting clause whatever; and (2) because no offence now known by the laws of this commonwealth is therein described.³

SHAW, C. J., delivered the opinion of the court. This indictment can not be maintained, consistently with the decision of the court, last year, in the case in this county, of *Commonwealth v. Cooley*, 10 Pick. 37. In that case it was held, that the statute of 1814 containing a series of provisions in relation to the whole subject-matter of the disinterment of dead bodies, had superseded and by necessary implication, repealed the provisions of the common law on the same subject. If it be true, as contended, that as a general rule the repeal of a repealing law revives the pre-existing law, it would be difficult to maintain that such a cause of repeal, in a statute containing a series of provisions, revising the whole subject, and superseding the existing statute, would revive the pre-existing provisions of the common law. But were that point conceded, as contended for, it would not aid this indictment.

In the case supposed, the common law would not be in force during the existence of the statute, and if revived by its repeal, such revival would take effect only from the time of such repeal.

It is clear, that there can be no legal conviction for an offence,

³ Arguments of counsel are omitted.

unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. If the law ceases to operate by its own limitation or by a repeal, at any time before judgment, no judgment can be given. Hence, it is usual in every repealing law, to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions, and often as to all violations of the existing law already committed.

These principles settle the present case. By the statute 1830, c. 57, § 6, that of 1814 was repealed without any saving clause. The act charged upon the defendants as an offense was done after the passing of the statute of 1814, and before that of 1830. The act can not be punished as an offence at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed without any saving clause; nor by the statute of 1830, for the act was done before that statute was passed. No judgment therefore can be rendered against the defendants on this indictment. Judgment arrested.

Section 3.—Omission to Act.

STATE v. O'BRIEN.

1867. SUPREME COURT OF NEW JERSEY. 32 N. J. L. 169.

The opinion of the court was delivered by

DALRIMPLE, J.⁴—On the fifteenth day of November, 1865, the defendant was a switch-tender, in the employ of the New Jersey Railroad and Transportation Company. His duty was to adjust and keep adjusted the switches of the road at a certain point in the city of Newark, so that passenger trains running over the road would continue on the main track thereof, and pass thence to the city of Elizabeth. He failed to perform such duty, whereby a passenger train of cars, drawn by a locomotive engine, was unavoidably diverted from the main track to a side track, and thence thrown upon the ground. The cars were thrown upon each other with great force and violence, by means whereof one Henry Gardner, a passenger upon the train, was so injured that he died. The defendant was indicted for manslaughter and convicted upon trial in the Essex Oyer and Terminer. He insisted, and in different forms, asked the court to charge the jury, that he could not legally be convicted, unless his will concurred in his omission of duty; the

⁴ The facts are sufficiently set forth in the opinion.

court refused so to charge. A rule to show cause why the verdict should not be set aside was granted, and the case certified into this court for its advisory opinion, as to whether there was any error in the charge of the court below, or in the refusal to charge, as requested.

The indictment was for the crime of manslaughter. If the defendant's omission of duty was wilful, or in other words, if his will concurred in his negligence, he was guilty of murder. Intent to take life, whether by an act of omission or commission, distinguishes murder from manslaughter. In order to make out against the defendant the lesser offence of manslaughter, it was not necessary that it should appear that the act of omission was wilful or of purpose. The court was right in its refusal to charge, as requested. The only other question is, whether there is error in the charge delivered. The error complained of is, that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. Professor Greenleaf, in the third volume of his work on evidence, § 129, in treating of homicide, says: "It may be laid down, that where one, by his negligence, has contributed to the death of another, he is responsible. The caution which the law requires in all these cases, is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end." Wharton, in his *Treatise on Criminal Law*, p. 382, says: "There are many cases in which death is the result of an occurrence, in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible, depends upon the inquiry, whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure, must be proportioned to the probability of danger attending the act immediately conducive to the death." The propositions so well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. The charge, in the respect complained of, was in accordance with them. It expressly states, that it was a question of fact for the jury to settle, whether the defendant was, or was not guilty of negligence; whether his conduct evinced under the circumstances such care and diligence as were proportionate to the danger to life impending. The very definition of crime is an act omitted or committed in violation of public law. The defendant in this case omitted his duty under such circumstances, as amounted to gross or culpable or criminal negligence. The court charged the jury, that if the defendant, at the time of the accident was intending to do his duty, but in a moment of forgetfulness omitted something which any one

of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds the question of fact involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only to his employers, but to the public. He was found to have been grossly negligent in the performance of that duty, whereby human life was sacrificed. His conviction was right, and the court below should be so advised.

REGINA v. LOWE.

1850. WORCESTER SUMMER ASSIZES. 4 Cox C. C. 449.

The prisoner was indicted for the manslaughter of Thomas Tibetts, on the 3d of June, 1850.

From the evidence in support of the charge, it appeared that the deceased was a collier, working in coal pits, and the prisoner was employed by Messrs. Jones and Darly, the owners of the pits, to attend the steam-engine by which the "skip," or basket, was raised up or let down the shaft of the pit with the workmen, on their way from and to their work. In the case of the men ascending the pit, it was the prisoner's duty to set the engine in motion to raise the skip until it reached about two feet above the surface or mouth of the pit, and then to stop the engine, so as to allow a "waggon" or platform to be moved over the mouth of the pit, and enable the men to get out of the skip with safety.

The prisoner, instead of attending at the engine, as was his duty, left it on the morning of the 3d of June, 1850, in the care of John Stockley, a lad fifteen years of age. Stockley remonstrated with the prisoner at the time, and told him that he, Stockley, would not work the skip. The prisoner replied that the witness was too idle to work it, but he would make him. The prisoner then went away to a public-house.

During his absence the deceased (having descended the pit early in the morning), made the usual signal for the skip to be drawn up, by calling out to the boy stationed at the top of the shaft, whose duty it was in his turn to repeat the signal to the person having charge of the engine. In this instance the boy repeated the signal as usual, and Stockley set the engine to work, but failed in stopping it at the proper time when the skip reached the surface with the deceased and two fellow workmen. The failure was proved to be because "the skipper did not knock the engine up into the cap," Stockley stating that he did not know how to do it. The consequence was that the skip was drawn up to the pulley over which the rope connecting the skip with the engine passed, and the deceased forced out, falling down the shaft, which was 170 yards deep, and was of course killed.

At the close of the case for the prosecution, Huddleston, for the prisoner, said he would take his lordship's opinion as to whether the facts, as proved, constituted the crime of manslaughter, or, in other words, whether a man whose duty it is to attend at a particular place or fill a particular office, and omits to attend, and leaves an incompetent person in his place, and death ensues, is guilty of manslaughter? In *Rex v. Allan and Clark* (7 C. & P. 153), it was held that where a sailing vessel was run down by a steam-boat in consequence of the improper steerage of the latter, arising from there not being a man at the bow to keep a look-out at the time of the accident, neither the captain nor pilot could be convicted of the manslaughter of a person in the vessel run down. Parke, J., then observed—"Supposing the captain had put a man at the proper part of the vessel and gone to lie down, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make anything of it. And Alderson, B., said to the jury, 'There is no act of personal misconduct or personal negligence on the part of these persons at the bar.' A distinction appears to be taken between those cases where case or trespass would be, respectively, the civil remedy. In *Rex v. Green* (7 C. & P. 156), also, it was held that to make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient. No doubt seems to have been expressed that, supposing the captain had gone down to bed, and the accident happened, that he could not have been responsible. In the present case the prisoner had gone away to a public-house."

LORD CAMPBELL, C. J.—I am clearly of opinion that an act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter, and that there is evidence to go to the jury of such a criminal omission in this case.

Huddleston then addressed the jury on the question whether there was gross negligence, or, even if there was, whether the death of the deceased was caused by it.

Verdict, guilty.

PEOPLE v. BEARDSLEY.

1907. SUPREME COURT OF MICHIGAN. 150 Mich. 206,
113 N. W. 1128, 121 Am. St. 617.

Error to Oakland; SMITH, J.

Carroll Beardsley was convicted of manslaughter, and sentenced to imprisonment for not less than one or more than five years in

the state prison at Jackson. Reversed, and respondent discharged.

McALVAY, C. J.—Respondent was convicted of manslaughter before the circuit court for Oakland county, and was sentenced to the state prison at Jackson for a minimum term of one year and a maximum term not to exceed five years. He was a married man living at Pontiac, and at the time the facts herein narrated occurred, he was working as a bartender and clerk at the Columbia Hotel. He lived with his wife in Pontiac, occupying two rooms on the ground floor of a house. Other rooms were rented to tenants, as was also one living room in the basement. His wife being temporarily absent from the city respondent arranged with a woman named Blanche Burns, who at the time was working at another hotel, to go to his apartments with him. He had been acquainted with her for some time. They knew each others habits and character. They had drunk liquor together, and had on two occasions been in Detroit and spent the night together in houses of assignation. On the evening of Saturday, March 18, 1905, he met her at the place where she worked, and they went together to his place of residence. They at once began to drink and continued to drink steadily, and remained together, day and night, from that time until the afternoon of the Monday following, except when respondent went to his work on Sunday afternoon. There was liquor at these rooms, and when it was all used they were served with bottles of whiskey and beer by a young man who worked at the Columbia Hotel, and who also attended respondent's fires at the house. He was the only person who saw them in the house during the time they were there together. Respondent gave orders for liquor by telephone. On Monday afternoon, about one o'clock, the young man went to the house to see if anything was wanted. At this time he heard respondent say they must fix up the rooms, and the woman must not be found there by his wife, who was likely to return at any time. During this visit to the house the woman sent the young man to a drug store to purchase, with money she gave him, camphor and morphine tablets. He procured both articles. There were six grains of morphine in quarter-grain tablets. She concealed the morphine from respondent's notice, and was discovered putting something into her mouth by him and the young man as they were returning from the other room after taking a drink of beer. She in fact was taking morphine. Respondent struck the box from her hand. Some of the tablets fell on the floor, and of these respondent crushed several with his foot. She picked up and swallowed two of them, and the young man put two of them in the spittoon. Altogether it is probable she took from three to four grains of morphine. The young man put two of them in the spittoon. Altogether it is

by telephone about an hour later, and after he came to the house requested him to take the woman into the room in the basement which was occupied by a Mr. Skoba. She was in a stupor and did not rouse when spoken to. Respondent was too intoxicated to be of any assistance and the young man proceeded to take her down stairs. While doing this Skoba arrived, and together they put her in his room on the bed. Respondent requested Skoba to look after her, and let her out the back way when she waked up. Between nine and ten o'clock in the evening Skoba became alarmed at her condition. He at once called the city marshal and a doctor. An examination by them disclosed that she was dead.

Many errors are assigned by the respondent, who asks to have his conviction set aside. The principal assignments of error are based upon the charge of the court, and refusal to give certain requests to charge, and are upon the theory that under the undisputed evidence in the case, as claimed by the people and detailed by the people's witnesses, the respondent should have been acquitted and discharged. In the brief of the prosecutor his position is stated as follows:

"It is the theory of the prosecution that the facts and circumstances attending the death of Blanche Burns in the house of respondent were such as to lay upon him a duty to care for her, and the duty to take steps for her protection, the failure to take which was sufficient to constitute such an omission as would render him legally responsible for her death. * * * There is no claim on the part of the people that the respondent * * * was in any way an active agent in bringing about the death of Blanche Burns, but simply that he owed her a duty which he failed to perform, and that in consequence of such failure on his part she came to her death."

Upon this theory a conviction was asked and secured.

The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. 21 Cyc., p. 770, *et seq.*, and cases cited. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. 1 Bishop on Criminal Law (6th ed.), § 217; 2 Bishop on Criminal Law (6th ed.), § 695; 21 Am. & Eng. Ency. Law (2d ed.), p. 99; 21 Cyc. p. 770 *et seq.*; State v. Noakes, 70 Vt. 247; 2 Wharton on Criminal Law (7th ed.), § 1011; Clark & Marshall on Crime (2d ed.), p. 379 (c), and cases cited.

Although the literature upon the subject is quite meagre and

the cases few, nevertheless, the authorities are in harmony as to the relationship which must exist between the parties to create the duty, the omission of which establishes legal responsibility. One authority has briefly and correctly stated the rule, which the prosecution claims should be applied to the case at bar, as follows:

"If a person who sustains to another the legal relation of protector, as husband to wife, parent to child, master to seaman, etc., knowing such person to be in peril of life, willfully or negligently fails to make such reasonable and proper efforts to rescue him as he might have done without jeopardizing his own life or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies.

"So one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body, is bound to execute the charge with proper diligence and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die." 21 Am. & Eng. Ency. Law (2d ed.), p. 197, notes and cases cited.

The following brief digest of cases gives the result of our examination of American and English authorities, where the doctrine of criminal liability was involved when death resulted from an omission to perform a claimed duty. We discuss no cases where statutory provisions are involved.

In *Territory v. Manton*, 8 Mont. 95, a husband was convicted of manslaughter for leaving his intoxicated wife one winter's night lying in the snow, from which exposure she died. The conviction was sustained on the ground that a legal duty rested upon him to care for and protect his wife, and that his neglect to perform that duty, resulting in her death, he was properly convicted.

State v. Smith, 65 Me. 257, is a similar case. A husband neglected to provide clothing and shelter for his insane wife. He left her in a bare room without fire during severe winter weather. Her death resulted. The charge in the indictment is predicated upon a known legal duty of the husband to furnish his wife with suitable protection.

In *State v. Behm*, 72 Iowa 533, the conviction of a mother of manslaughter for exposing her infant child without protection, was affirmed upon the same ground. See, also, *Gibson v. Commonwealth*, 106 Ky. 360.

State v. Noakes, *supra*, was a prosecution and conviction of a husband and wife for manslaughter. A child of a maid servant was born under their roof. They were charged with neglecting to furnish it with proper care. In addition to announcing the

principle in support of which the case is already cited, the court said:

"To create a criminal liability for neglect by nonfeasance, the neglect must also be of a personal, legal duty, the natural and ordinary consequences of neglecting which would be dangerous to life."

In reversing the case for error in the charge—not necessary to here set forth—the court expressly stated that it did not concede that respondents were under a legal duty to care for this child because it was permitted to be born under their roof, and declined to pass upon that question.

In a federal case tried in California before Mr. Justice Field of the United States Supreme Court, where the master of a vessel was charged with murder in omitting any effort to rescue a sailor who had fallen overboard, the learned justice in charging the jury said:

"There may be in the omission to do a particular act under some circumstances, as well as in the commission of an act, such a degree of criminality as to render the offender liable to indictment for manslaughter. * * * In the first place the duty omitted must be a plain duty. * * * In the second place it must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity, or his sense of justice or propriety." *United States v. Knowles*, 4 Sawy. (U. S.), 517. Fed. Cas. No. 15,540.

The following English cases are referred to as in accord with the American cases above cited, and are cases where a clear and known legal duty existed: *Reg. v. Conde*, 10 Cox C. C. 547; *Reg. v. Rugg*, 12 Cox C. C. 16.

The case of *Reg. v. Nichols*, 13 Cox C. C. 75, was a prosecution of a penniless old woman, a grandmother, for neglecting to supply an infant grandchild left in her charge with sufficient food and proper care. The case was tried at assizes in Stafford before Brett, J., who said to the jury:

"If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without (at all events) wicked negligence, and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter."

The vital question was whether there had been any such negligence in the case designated by the trial judge as wicked negligence. The trial resulted in an acquittal. The charge of this *nisi prius* judge recognizes the principle that a person may voluntarily assume the care of a helpless human being, and having assumed it, will be held to be under an implied legal duty to

care for and protect such person, the duty assumed being that of caretaker and protector to the exclusion of all others.

Another English case decided in the appellate court, Lord Coleridge, C. J., delivering the opinion, is *Regina v. Instan*, 17 Cox C. C. 602. An unmarried woman without means lived with and was maintained by her aged aunt. The aunt suddenly became very sick, and for ten days before her death was unable to attend to herself, to move about, or to do anything to procure assistance. Before her death no one but the prisoner had any knowledge of her condition. The prisoner continued to live in the house at the cost of the deceased and took in the food supplied by the tradespeople. The prisoner did not give food to the deceased, or give or procure any medical or nursing attendance for her; nor did she give notice to any neighbor of her condition or wants, although she had abundant opportunity and occasion to do so. In the opinion, Lord Coleridge, speaking for the court said:

"It is not correct to say that every moral obligation is a legal duty; but every legal duty is founded upon a moral obligation. In this case, as in most cases, the legal duty can be nothing else than taking upon one's self the performance of the moral obligation. There is no question whatever that it was this woman's clear duty to impart to the deceased so much of that food, which was taken into the house for both and paid for by the deceased, as was necessary to sustain her life. The deceased could not get it for herself. She could only get it through the prisoner. It was the prisoner's clear duty at common law to supply it to the deceased, and that duty she did not perform. Nor is there any question that the prisoner's failure to discharge her legal duty, if it did not directly cause, at any rate accelerated, the death of the deceased. There is no case directly on the point; but it would be a slur and a stigma upon our law if there could be any doubt as to the law to be derived from the principle of decided cases, if cases were necessary. There was a clear moral obligation, and a legal duty founded upon it; a duty willfully disregarded and the death was at least accelerated, if not caused, by the nonperformance of the legal duty."

The opening sentences of this opinion are so closely connected with the portion material to this discussion that they could not well be omitted. Quotation does not necessarily mean approval. We do not understand from this opinion that the court held that there was a legal duty founded solely upon a moral obligation. The court indicated that the law applied in the case was derived from the principles of decided cases. It was held that the prisoner had omitted to perform that which was a clear duty at the common law. The prisoner had wrongfully appropriated the food of the deceased and withheld it from

her. She was the only other person in the house, and had assumed charge of her helpless relative. She was under a clear legal duty to give her the food she withheld, and under an implied legal duty by reason of her assumption of charge and care, within the law as stated in the case of *Regina v. Nicholls*, 13 Cox C. C. 75.

These adjudicated cases and all others examined in this investigation we find are in entire harmony with the proposition first stated in this opinion.

Seeking for a proper determination of the case at bar by the application of the legal principles involved, we must eliminate from the case all consideration of mere moral obligation, and discover whether respondent was under a legal duty towards *Blanche Burns* at the time of her death, knowing her to be in peril of her life, which required him to make all reasonable and proper effort to save her, the omission to perform which duty would make him responsible for her death. This is the important and determining question in this case. If we hold that such legal duty rested upon respondent it must arise by implication from the facts and circumstances already recited. The record in this case discloses that the deceased was a woman past 30 years of age. She had been twice married. She was accustomed to visiting saloons and to the use of intoxicants. She previously had made assignations with this man in Detroit, at least twice. There is no evidence or claim from this record that any duress, fraud, or deceit had been practiced upon her. On the contrary it appears that she went upon this carouse with respondent voluntarily and so continued to remain with him. Her entire conduct indicates that she had ample experience in such affairs.

It is urged by the prosecutor that the respondent "stood towards this woman for the time being in the place of her natural guardian and protector, and as such owed her a clear legal duty which he completely failed to perform." The cases cited and digested establish that no such legal duty is created based upon a mere moral obligation. The fact that this woman was in his house created no such legal duty as exists in law and is due from a husband toward his wife, as seems to be intimated by the prosecutor's brief. Such an inference would be very repugnant to our moral sense. Respondent had assumed either in fact or by implication no care or control over his companion. Had this been a case where two men under like circumstances had voluntarily gone on a debauch together and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion. How can the fact that in this case one of the parties was a woman change the prin-

ciple of law applicable to it? Deriving and applying the law in this case from the principle of decided cases, we do not find that such legal duty as is contended for existed in fact or by implication on the part of respondent towards the deceased, the omission of which involved criminal liability. We find no more apt words to apply to this case than those used by Mr. Justice Field in *United States v. Knowles*, *supra*.

"In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; * * * and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."

Other questions discussed in the briefs need not be considered. The conviction is set aside, and respondent is ordered discharged. *Montgomery, Ostrander, Hooker and Moore, JJ.*, concurred.

Section 4.—Solicitation.

REX v. HIGGINS.

1801. KING'S BENCH. 2 East 5.

The defendant was indicted for a misdemeanor at the Quarter Sessions for the county of Lancaster, and was convicted on the second count of the indictment, charging, "That he on, &c., at, &c., did falsely, wickedly, and unlawfully solicit and incite one James Dixon, a servant of J. Phillips, &c., to take, embezzle, and steal a quantity of twist, of the value of three shillings, of the goods and chattels of his masters, J. P., &c., aforesaid, to the great damage of the said J. P., &c., to the evil example, &c., and against the peace," &c. After judgment of the pillory and two years' imprisonment, a writ of error was brought, and the following causes assigned for error: 1. That the said count does not set forth any misdemeanor or offence which the justices of peace at their Quarter Sessions had jurisdiction to determine. 2. That it does not appear that J. Dixon, the principal, was ever convicted of the felony wherewith the defendant appears to be charged, as accessory before the fact. 3. The general error.

LEBLANC, J.⁵—It is contended that the offence charged in the second count, of which the defendant has been convicted, is no

⁵ Arguments of counsel, and concurring opinions of Kenyon, C. J., Grose, J., and Lawrence, J., are omitted.

misdeemeanor, because it amounts only to a bare wish or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done; namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to. The cases of *R. v. Daniel*, and *R. v. Callingwood*, cited for the defendant, do not support the proposition that a mere solicitation is not indictable; on the contrary, Lord Holt says in the former case, that perhaps an indictment might be for the evil act of persuading another to steal. That part of the case, however, was determined upon the want of a venue. And in *R. v. Callingwood*, the only point determined was, that the first part of the charge, which was for enticing an apprentice to take and carry away goods from his master, was not indictable, being only a private injury for which an action on the case would lie, but not of such a public nature as to maintain an indictment; and that the second part of the charge was not well laid for want of a venue. Then as to the objection that the Quarter Sessions had no jurisdiction in this case, it is sufficient to answer, that the general words of the commission of the peace comprehend all trespasses; and the word trespasses not only includes direct breaches of the peace, but also all such offences as have a tendency thereto; and on that ground conspiracies have been holden to be cognizable by the Sessions; not as actual breaches of the peace, but as tending thereto. And it appears to me that this is an offence tending to a breach of the peace, and is therefore indictable before that jurisdiction.

Judgment affirmed.

REGINA v. GREGORY.

1867. CROWN CASE RESERVED. 1 Law Rep. C. C. R. 77.

The following case was stated by the deputy recorder of Leeds:—

James Gregory was tried and convicted before me at the Quarter Sessions for the borough of Leeds, held there on the 20th of April, 1867, upon an indictment, the material parts of which are as follows:

"The jurors, &c., present that James Gregory, on the 9th of February, 1867, falsely, wickedly, and unlawfully, did solicit and incite one John White, a servant of one James Kirk, feloniously to steal, take, and carry away a large quantity, to wit, one

bushel of barley, of the goods, &c., of Kirk, against the peace, &c."

A second count in the same form alleged the offence to have been committed on the 12th of February. A third count alleged that the defendant wickedly and unlawfully did solicit and incite the said John White, and one Charles Evans, and one Charles Knapton, they being servants of Kirk, feloniously to steal a large quantity of barley, of the goods of the said Kirk, against the peace, &c. The indictment charging a misdemeanor, the jury were sworn accordingly. There was evidence upon all the counts of the indictment in proof of the offence charged; but no one of the three servants named stole any barley in compliance with the defendant's solicitations or otherwise.

It was objected by counsel for the defendant that the offence proved (no felony having been committed by reason of the defendant's solicitation and incitement) came under the provision of the 24 and 25 Vict., c. 94, s. 2, which makes it a felony to "counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed;" and that, although that section of the statute apparently contemplated that a felony must be committed by reason of the counsel, procurement, or command, yet that the court of King's Bench in the case of *Rex v. Higgins*, which was apparently the last case on the subject, held it not to be necessary that the felony should be committed by reason of the counsel or procurement, and that the solicitation to commit the offence was an act done towards the commission of the offence, which made it at that time per se the offence of misdemeanor, and that now the statute of Victoria changed the quality of the offence, and made it a felony. The offence therefore of incitement to commit a felony under the ruling of *Rex v. Higgins*, and under the 2d section of the 24 and 25 Vict., c. 94, was now no longer a misdemeanor but a felony, and complete as a felony upon proof of the incitement alone. The indictment, therefore, not charging the incitement and solicitation of the prisoner to have been done "feloniously" was bad: *Reg. v. Gray*. I left the case to the jury, directing them in accordance with the decision in *Rex v. Higgins* that the soliciting a servant to steal his master's goods is a misdemeanor, although it be not charged in the indictment that the servant stole the goods, or that any other act was done except the soliciting and inciting. I also directed them that in my opinion the 24 and 25 Vict., c. 94, s. 2, did not affect a case where there was no principal felon or principal felony; but at the urgent request of the defendant's counsel I reserved this case for the consideration of the justices of either bench and barons of the exchequer.

The question upon which the opinion of the Court for the Consideration of Crown Cases Reserved is respectfully requested is, whether, since the passing of the 24 and 25 Vict., c. 94, it is a misdemeanor to solicit and incite a servant to steal his master's goods, though no other act be done except the soliciting and inciting?

This case was argued before Kelly, C. B., Martin, B., and Byles, Keating, and Shee, JJ.

C. Foster, for the prisoner. The conviction is wrong. Originally, no doubt, the offence was a misdemeanor; but the 24 and 25 Vict., c. 94, has altered its quality, and it is now a felony. To solicit and incite is in fact to counsel and procure; and the prisoner was therefore within the 24 and 25 Vict., c. 94, and might have been convicted of the substantive felony of counselling and procuring White to commit a felony. Then, the offence having thus become a felony, no indictment will lie for it as a misdemeanor: *Rex v. Cross* (1).

Waddy, for the crown, was not called upon.

KELLY, C. B.—The first question is, whether a soliciting and inciting is equivalent to a counselling and procuring, so that an allegation of the former would sustain a conviction upon a statute making the latter an offence. It is not necessary to decide that point now; but we must not be taken to hold that an indictment founded upon a statute could be sustained, if, instead of the words of the statute, it used other words which might have a different signification. The second question is, whether the soliciting and inciting, or, indeed, the counselling and procuring (if we may supply those words), a man to commit a felony, are within the 24 and 25 Vict., c. 94, so as to make the soliciting and inciting a felony, although no principal felony be committed. Looking at the structure of the section, and construing it by the ordinary rules of grammar, it is impossible to put that construction upon it. There can be no accessory to a felony, unless a felony has been committed. Here there was no principal felony; and, therefore, the prisoner's offence was a misdemeanor only, and he has been properly convicted.

Conviction affirmed.

COMMONWEALTH v. WILLARD.

1839. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 22 Pick. 476.

This was a writ of habeas corpus to the sheriff of this county, to bring before the court the body of George W. Richardson.

It appeared that Richardson was summoned as a witness before the grand jury, for the purpose of proving that one Gould had sold to him spirituous liquors, in violation of St. 1838, c. 157,

§ 1; that he refused to testify, on the ground, that as such sale was made a misdemeanor by the statute, his testimony might criminate himself and subject him, as the purchaser, to prosecution at common law, for inducing Gould to commit a misdemeanor; and that he was thereupon committed to prison by order of the Court of Common Pleas, for contempt.

SHAW, C. J., delivered the opinion of the court.⁶

* * * * *

No man, certainly, is bound to answer a question, as a witness, if the fact to which he is called to testify, would subject him to a penalty or forfeiture, or expose him to a criminal prosecution; although it would be no excuse, that it would be against his mere pecuniary interest. *Bull v. Loveland*, 10 Pick. 9.

The witness objected to testifying, on the ground, that as the selling of spirituous liquors, without being a physician or apothecary licensed for that purpose, was made a misdemeanor by the statute, to purchase of such person necessarily implied an inducement held out to commit such misdemeanor, and that to induce another to commit a misdemeanor is an offence punishable at common law, to which the witness would be exposed. But the court are of opinion that the witness would not be liable to any prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. That such a prosecution is unprecedented, shows very strongly what has been understood to be the law upon this subject.

It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offence proposed to be committed, by the counsel, advice or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered mala in se or criminal in themselves, in contradistinction to mala prohibita, or acts otherwise indifferent than as they are restrained by posi-

⁶ Argument of counsel and part of the opinion are omitted.

tive law. All the cases cited in support of the objection of the witness are of this description.

Rex v. Higgins, 2 East 5, was a case where the accused had solicited a servant to steal his master's goods, and it was held to be a misdemeanor. The crime, if committed pursuant to such solicitation, would have been a felony.

Rex v. Phillips, 6 East 464, was a manifest attempt to provoke another person by a letter, to send a challenge to fight a duel. For although the direct purpose of the letter of the defendant, was to induce the other party to send a challenge, which is technically a misdemeanor, yet the real object was to bring about a deed, which is a high and aggravated breach of the public peace, and where it results in the death of either party, is clearly murder. It was averred to be done with an intent to do the party bodily harm and to break the king's peace, and such intent was considered a material fact to be averred and proved.

A case depending upon a similar principle in our own books, is that of *Commonwealth v. Harrington*, 3 Pick. 26, in which it was held, that to let a house to another, with an intent that it should be used and occupied for the purposes of prostitution, with the fact that it was so used, was a misdemeanor. The keeping of such a disorderly house has long been considered a high and aggravated offence, criminal in itself, tending to general disorder, breaches of the public peace, and of common nuisance to the community. It is in cases of this character only, that the principle has been applied; but we know of no case, where an act which, previously to the statute, was lawful or indifferent, is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be itself punishable. Such a case perhaps may arise, under peculiar circumstances, in which the principle of law, which in itself is a highly salutary one, will apply; but the court are all of opinion that it does not apply to the case of one, who, by purchasing spirituous liquor of an unlicensed person, does, as far as that act extends, induce that other to sell in violation of the statute.

* * * * *

Ordered, that the prisoner be remanded to the custody of the sheriff, to abide the order of the Court of Common Pleas, under which he stands committed.⁷

⁷ It is held by the weight of authority that it is a crime to solicit the commission of an offense of a high and aggravated character seriously affecting society, whether a felony or misdemeanor; see *Commonwealth v. Hutchinson*, 6 Pa. Super. Ct. 405; *Regina v. Ransford*, 13 Cox. C. C. 9; *Commonwealth v. Flagg*, 135 Mass. 545. Some courts have held that solicitation to commit a misdemeanor is not a crime; see *Regina v. Pierson*, 1 Salk. 382, *Smith v. Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686.

Section 5.—Attempt.**PEOPLE v. MURRAY.**

1859. SUPREME COURT OF CALIFORNIA. 14 Cal. 159.

APPEAL from the Court of Sessions, Trinity County.

Indictment for an attempt to contract an incestuous marriage. Defendant was tried, convicted, and sentenced to the state prison for one year. He appeals.

FIELD, C. J., delivered the opinion of the court. COPE, J., and BALDWIN, J., concurring

The evidence in this case entirely fails to sustain the charge against the defendant of an attempt to contract an incestuous marriage with his niece. It only discloses declarations of his determination to contract the marriage, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony. It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with any attempt to kill. So in the present case, the declarations, and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it can not be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifest by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.

Judgment reversed and cause remanded.⁸

⁸ See *Regina v. Chapman*, 2 Car. & K. 846, holding that an attempt to marry without a license had been committed when the defendant took a false oath to procure a license.

COMMONWEALTH v. PEASLEE.

1901. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
177 Mass. 267, 59 N. E. 55.

HOLMES, C. J.^o—This is an indictment for an attempt to burn a building and certain goods therein, with intent to injure the insurers of the same. Pub. Sts., c. 10, s. 8. The substantive offence alleged to have been attempted is punished by Pub. Sts., c. 203, s. 7. The defence is that the overt acts alleged and proved do not amount to an offence. It was raised by a motion to quash and also by a request to the judge to direct a verdict for the defendant. We will consider the case in the first place upon the evidence, apart from any question of pleading, and afterwards will take it up in connection with the indictment as actually drawn.

The evidence was that the defendant had constructed and arranged combustibles in the building in such a way that they were ready to be lighted, and if lighted would have set fire to the building and its contents. To be exact, the plan would have required a candle which was standing on a shelf six feet away to be placed on a piece of wood in a pan of turpentine and lighted. The defendant offered to pay a young man in his employment if he would go to the building, seemingly some miles from the place of the dialogue, and carry out the plan. This was refused. Later the defendant and the young man drove toward the building, but when within a quarter of a mile the defendant said that he had changed his mind and drove away. This is as near as he ever came to accomplishing what he had in contemplation.

The question on the evidence, more precisely stated, is whether the defendant's act come near enough to the accomplishment of the substantive offence to be punishable. The statute does not punish every act done toward the commission of a crime, but only such acts done in an attempt to commit it. The most common types of an attempt are either an act which is intended to bring about the substantive crime and which sets in motion natural forces that would bring it about in the expected course of events but for an unforeseen interruption, as in this case if the candle had been set in its place and lighted but had been put out by the police, or an act which is intended to bring about the substantive crime and would bring it about but for a mistake of judgment in a matter of nice estimate or experiment, as when a pistol is fired at a man but misses him, or when one tries to pick

^o The statement of facts is omitted.

a pocket which turns out to be empty. In either case the would-be criminal, has done his last act.

Obviously new considerations come in when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind. In strictness, such first steps can not be described as an attempt, because that word suggests an act seemingly sufficient to accomplish the end, and has been supposed to have no other meaning. *People v. Murray*, 14 Cal. 159, 160. That an overt act although coupled with an intent to commit the crime commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor although there is still a *locus penitentiae* in the need of a further exertion of the will to complete the crime. As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite. *Commonwealth v. Kennedy*, 170 Mass. 18, 22. (See also *Commonwealth v. Willard*, 22 Pick. 476.) A few instances of liability of this sort are mentioned on the page cited.

As a further illustration, when the servant of a contractor had delivered short rations of meat by the help of a false weight which he had substituted for the true one, intending to steal the meat left over, it was held by four judges, two of whom were Chief Justice Erle and Mr. Justice Blackburn, that he could be convicted of an attempt to steal. *Regina v. Cheeseman*, L. & C. 140; s. c. 10 W. R. 255. So lighting a match with intent to set fire to a haystack, although the prisoner desisted on discovering that he was watched. *Regina v. Taylor*, 1 F. & F. 511. So getting into a stall with a poisoned potato, intending to give it to a horse there, which the prisoner was prevented from doing by his arrest. *Commonwealth v. McLaughlin*, 105 Mass. 460. See *Clark v. State*, 86 Tenn. 511. So in this commonwealth it was held criminal to let a house to a woman of ill fame with intent that it should be used for purposes of prostitution, although it would seem that the finding of intent meant only knowledge of the intent of the lessee. *Commonwealth v. Harrington*, 3 Pick. 26. See *Commonwealth v. Willard*, 22 Pick. 476, 478. Compare *Brockway v. People*, 2 Hill, 558, 562. The same has been held as to paying a man to burn a barn, whether well laid as an attempt or more properly as soliciting to commit a felony. *Commonwealth v. Flagg*, 135 Mass. 545, 549. *State v. Bowers*, 35

S. Car. 262. Compare *Regina v. Williams*, 1 C. & K. 589; s. c. 1 Denison, 39. *McDade v. People*, 29 Mich. 50, 56. *Stabler v. Commonwealth*, 95 Pa. St. 318. *Hicks v. Commonwealth*, 86 Va. 223.

On the other hand, making up a false invoice at the place of exportation with intent to defraud the revenue is not an offense if not followed up by using it or attempting to use it. *United States v. Twenty-eight Packages*, Gilpin, 306, 324. *United States v. Riddle*, 5 Cranch 311. So in *People v. Murray*, 14 Cal. 159, the defendant's elopement with his niece and his requesting a third person to bring a magistrate to perform the marriage ceremony, was held not to amount to an attempt to contract the marriage. But the ground on which this last decision was put clearly was too broad. And however it may be at common law, under a statute like ours punishing one who attempts to commit a crime "and in such attempt does any act towards the commission of such offence" (Pub. Sts., c. 210, s. 8), it seems to be settled elsewhere that the defendant could be convicted on evidence like the present. *People v. Bush*, 4 Hill 133, 134. *McDermott v. People*, 5 Parker Cr. Rep. 102. *Griffin v. State*, 26 Ga. 493. *State v. Hayes*, 78 Mo. 307, 316. See *Commonwealth v. Willard*, 22 Pick. 476. *People v. Bush* is distinguished in *Stabler v. Commonwealth* as a decision upon the words quoted. 95 Pa. St. 322.

Under the cases last cited we assume that there was evidence of a crime and perhaps of an attempt,—the latter question we do not decide. Nevertheless, on the pleadings a majority of the court is of opinion that the exceptions must be sustained. A mere collection and preparation of materials in a room for the purpose of setting fire to them, unaccompanied by any present intent to set the fire, would be too remote. If the accused intended to rely upon his own hands to the end, he must be shown to have had a present intent to accomplish the crime without much delay, and to have had this intent at a time and place where he was able to carry it out. We are not aware of any carefully considered case that has gone further than this. We assume without deciding that that is the meaning of the indictment, and it would have been proved if for instance the evidence had been that the defendant had been frightened by the police as he was about to light the candle. On the other hand, if the offence is to be made out by showing a preparation of the room and a solicitation of some one else to set the fire, which solicitation if successful would have been the defendant's last act, the solicitation must be alleged as one of the overt acts. It was admissible in evidence on the pleadings as they stood to show the defendant's intent, but it could not be relied on as an overt act unless set out. The necessity that the overt act should be alleged has been taken for granted in our practice and decisions.

(see e. g. *Commonwealth v. Sherman*, 105 Mass. 169; *Commonwealth v. McLaughlin*, 105 Mass. 460, 463; *Commonwealth v. Shedd*, 140 Mass. 451, 453), and is expressed in the forms and directions for charging attempts appended to St. 1899, c. 409, § 21 and § 28. *Commonwealth v. Clark*, 6 Gratt, 675. *State v. Colvin*, 90 N. Car. 717. The solicitations were alleged in *McDermott v. People*. In New York it was not necessary to lay the overt acts relied upon. *Mackesey v. People*, 6 Parker Cr. Rep. 114, 117, and New York cases *supra*. See 3 Encyc. Pl. & Pr., "Attempts," 98. A valuable collection of authorities concerning the crime will be found under the same title in 3 Am. & Eng. Encyc. of Law (2d ed.). If the indictment had been properly drawn we have no question that the defendant might have been convicted.

Exceptions sustained.

PEOPLE v. MORAN.

1890. COURT OF APPEALS OF NEW YORK. 123 N. Y. 254,
25 N. E. 412, 10 L. R. A. 109, 20 Am. St. 732.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which reversed a judgment of the General Sessions entered upon a verdict convicting defendant of an attempt to commit the crime of grand larceny in the second degree.

The facts, so far as material, are stated in the opinion.

RUGER, C. J.¹⁰—The indictment in this case charged the defendant with an attempt to commit the crime of grand larceny in the second degree, by attempting to steal, take and carry away from the person of an unknown woman, in the day-time, in the city and county of New York, certain goods, chattels and personal property of a kind and description unknown, and of the alleged value of ten dollars. It is claimed that the evidence did not show an attempt to commit a larceny. The crime of grand larceny in the second degree is defined by § 531 of the Penal Code, among others, as that of a person who, under circumstances not amounting to grand larceny, steals and unlawfully appropriates property of any value, by taking the same from the person of another. A person who unsuccessfully attempts to commit a crime is made punishable by § 686 of the same code. Section 34 defines an attempt as "an act, done with an attempt to commit a crime, and tending but failing to effect its commission."

¹⁰ Arguments of counsel, and part of the opinion are omitted.

I have thus brought together the several statutes bearing directly upon the question involved in this appeal, for the purpose of exhibiting the clearness and directness of the provisions affecting the point to be determined. The evidence given upon the trial showed that the defendant, accompanied by two associates, was observed passing around among the people gathered in a crowded market in New York, and was seen to thrust his hand into the pocket of a woman and to withdraw it therefrom empty. Upon being approached by an officer, the defendant's companions escaped, but the defendant was arrested. The woman became lost in the crowd and was not discovered. Upon this evidence, the defendant's counsel asked the court to direct a verdict for the defendant upon the ground that the facts proved did not support the charge in the indictment. The request was denied and the defendant excepted. This exception presents the only question raised in the case and depends for its solution upon the construction to be given to § 34 of the Penal Code. The claim of the defendant is that the evidence did not show that the woman had any property in her pocket, which could be the subject of larceny, and that an attempt to commit that crime could not be predicated of a condition which rendered its commission impossible. We are of the opinion that the evidence was sufficient to authorize the jury to find the accused guilty of the offence charged. It was plainly inferrible from it that an intent to commit larceny from the person existed, and that the defendant did an act tending to effect its commission, although the effort failed. The language of the statute seems to us too plain to admit of doubt, and as intended to reach cases where an intent to commit a crime and an effort to perpetrate it, although ineffectual, co-existed. Whenever the *animus furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged there must be a person from whom the property may be taken; and intent to take it against the will of the owner; and some act performed tending to accomplish it, and when these things concur, the crime has, we think, been committed whether property could, in fact, have been stolen or not. In such cases the accused has done his utmost to effect the commission of the crime, but fails to accomplish it for some cause not previously apparent to him. The question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. (People v. Lawton, 56 Barb. 126; McDermott v. People, 5 Park. Cr. R. 104; Mackesey v. People, 6 *id.*, 114; Am. & Eng. Encyc. of Law, tit. "Attempt." So far as the thief is concerned, the felonious de-

sign and action are then just as complete as though the crime could have been, or, in fact, had been committed, and the punishment of such offender is just as essential to the protection of the public, as of one whose designs have been successful. In the language of Bouvier's Law Dictionary, an attempt is an endeavor to do an act carried beyond mere preparation; but falling short of execution. Some conflict has been observed in English authorities on this subject, and it may be conceded that the weight of authority in that country is in favor of the proposition that a person can not be convicted of an attempt to steal from the pocket, without proof that there was something in the pocket to steal. (Reg. v. M'Pherson, D. & B. C. C. 197; Reg. v. Collins, L. & C. 471.) The cases in England, however, are not uniform on this subject, and the principle involved in the cases above cited was, we think, otherwise stated in Reg. v. Goodall (2 Cox C. C. 40), where an attempt to commit a miscarriage was held to have been perpetrated on the body of a woman who was not at the time pregnant. (Reg. v. Goodchild, 2 C. & K. 293.) In this country, however, the courts have uniformly refused to follow the cases of Reg. v. M'Pherson and Reg. v. Collins, and have adopted the more logical and rational rule, that an attempt to commit a crime may be effectual, although, for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment. It would seem to be quite absurd to hold that an attempt to steal property from a person could not be predicated of a case where that person had secretly and suddenly removed the contents of one pocket to another, and thus frustrated the attempt, or had so guarded his property that it could not be detached from his person. At attempt is made, when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition.

* * * * *

The order of the General Term should be reversed and the judgment of the Court of General Sessions affirmed.

All concur, except Andrews, J., taking no part.

Order reversed and judgment affirmed.

PEOPLE v. JAFFE.

1906. COURT OF APPEALS OF NEW YORK. 185 N. Y. 497,
78 N. E. 169, 9 L. R. A. 263, 7 Ann. Cas. 348.

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 25, 1906,

which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York, rendered upon a verdict convicting the defendant of the crime of an attempt to receive stolen goods knowing the same to have been stolen.

The facts, so far as material, are stated in the opinion.

WILLARD BARTLETT, J.¹¹—The indictment charged that the defendant on the 6th day of October, 1902, in the county of New York, feloniously received twenty yards of cloth of the value of twenty-five cents a yard belonging to the copartnership of J. W. Goddard & Son, knowing that the said property had been feloniously stolen, taken and carried away from the owners. It was found under §550 of the Penal Code, which provides that a person who buys or receives any stolen property knowing the same to have been stolen is guilty of criminally receiving such property. The defendant was convicted of an attempt to commit the crime charged in the indictment. The proof clearly showed, and the district attorney conceded upon the trial, that the goods which the defendant attempted to purchase on October 6th, 1902, had lost their character as stolen goods at the time when they were offered to the defendant and when he sought to buy them. In fact, the property had been restored to the owners and was wholly within their control and was offered to the defendant by their authority and through their agency. The question presented by this appeal, therefore, is whether upon an indictment for receiving goods knowing them to have been stolen the defendant may be convicted of an attempt to commit the crime where it appears without dispute that the property which he sought to receive was not in fact stolen property.

The conviction was sustained by the Appellate Division chiefly upon the authority of the numerous cases in which it has been held that one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible. Notably among these are what may be called the pickpocket cases, where in prosecutions for attempts to commit larceny from the person by pocket picking it is held not to be necessary to allege or prove that there was anything in the pocket which could be the subject of larceny. (*Commonwealth v. McDonald*, 5 Cush. 365; *Rogers v. Commonwealth*, 5 Serg. & R. 463; *State v. Wilson*, 30 Conn. 500; *People v. Moran*, 123 N. Y. 254.) Much reliance was also placed in the opinion of the learned Appellate Division upon the case of *People v. Gardner*, 144 N. Y. 118, where a conviction of an attempt to commit the crime of extortion was upheld, although the woman from whom the defendant sought to obtain money by a threat to

¹¹ Arguments of counsel and the dissenting opinion of Chase, J., are omitted.

accuse her of a crime was not induced to pay the money by fear, but was acting at the time as a decoy for the police, and hence could not have been subjected to the influence of fear.

In passing upon the question here presented for our determination, it is important to bear in mind precisely what it was that the defendant attempted to do. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase, therefore, if it had been completely effected, could not constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a non-existent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it is a mere truism that there can be no receiving of stolen goods which have not been stolen. (2 Bishop's New Crim. Law, § 1140.) It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact.

The crucial distinction between the case before us and the pick-pocket cases, and others involving the same principle, lies not in the possibility or impossibility of the commission of the crime, but in the fact that in the present case the act, which it was doubtless the intent of the defendant to commit, would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy and received them into his possession, he would have committed no offense under § 550 of the Penal Code, because the very definition in that section of the offense of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such manner as to constitute larceny. This knowledge being a material ingredient of the offense it is manifest that it can not exist unless the property has in fact been stolen or larcenously appropriated. No man can know that to be so which is not so in truth and in fact. He may believe it to be so but belief is not enough under this statute. In the present case it appeared not only by the proof but by the express concession of the prosecuting officer that the goods which the defendant intended to purchase had lost their character as stolen goods at the time of the proposed transaction. Hence, no matter what was the motive of the defendant, and no matter what he supposed, he could do no act which was intrinsically adapted to the then present successful perpetration of the crime denounced by this section of the Penal Code, because neither he nor any one in the world could know that the property was stolen property inasmuch as it was not in fact stolen property.

In the pick-pocket cases the immediate act which the defendant

had in contemplation was an act which if it could have been carried out, would have been criminal, whereas in the present case the immediate act which the defendant had in contemplation (to wit, the purchase of the goods which were brought to his place for sale) could not have been criminal under the statute even if the purchase had been completed, because the goods had not in fact been stolen but were at the time when they were offered to him in the custody and under the control of the true owners.

If all which an accused person intends to do would if done constitute no crime it can not be a crime to attempt to do with the same purpose a part of the thing intended. (1 Bishop's Crim. Law [7th ed.], § 747.) The crime of which the defendant was convicted necessarily consists of three elements: first, the act; second, the intent; and third, the knowledge of an existing condition. There was proof tending to establish two of these elements, the first and second, but none to establish the existence of the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge. The defendant could not know that the property possessed the character of stolen property when it had not in fact been acquired by theft.

The language used by Ruger, Ch. J., in *People v. Moran* (123 N. Y. 254), quoted with approval by Earl, J., in *People v. Gardner* (144 N. Y. 119), to the effect that "the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design," although accurate in those cases, has no application to a case like this, where, if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offense. A particular belief can not make that a crime which is not so in the absence of such belief. Take, for example, the case of a young man who attempts to vote, and succeeds in casting his vote under the belief that he is but twenty years of age when he in fact is over twenty-one and a qualified voter. His intent to commit a crime, and his belief that he was committing a crime, would not make him guilty of any offense under these circumstances, although the moral turpitude of the transaction on his part would be just as great as it would if he were in fact under age. So, also, in the case of a prosecution under the statute of this state, which makes it rape in the second degree for a man to perpetrate an act of sexual intercourse with a female not his wife under the age of eighteen years. There could be no conviction if it was established upon the trial that the female was in fact over the age of eighteen years, although the defendant believed her to be younger and intended to commit the crime. No matter how reprehensible would be his act in morals, it would not be the act

forbidden by this particular statute. "If what a man contemplates doing would not be in law a crime, he could not be said in point of law to intend to commit the crime. If he thinks his act will be a crime this is a mere mistake of his understanding where the law holds it not to be such, his real intent being to do a particular thing. If the thing is not a crime he does not intend to commit one whatever he may erroneously suppose." (1 Bishop's Crim. Law [7th ed.], § 742.)

The judgment of the Appellate Division and of the Court of General Sessions must be reversed and the defendant discharged upon this indictment, as it is manifest that no conviction can be had thereunder. This discharge, however, in no wise affects the right to prosecute the defendant for other offenses of a like character concerning which there is some proof in the record, but which were not charged in the present indictment.

* * * * *

Cullen, Ch. J., Gray, Edward T. Bartlett, Vann and Werner, JJ., concur with Willard Bartlett, J.; Chase, J., dissents in memorandum.

Judgment of conviction reversed, etc.¹²

MULLEN v. STATE.

1871. SUPREME COURT OF ALABAMA. 45 Ala. 43, 6 Am. Rep. 691.

Appeal from Circuit Court of Elmore. Tried before Hon. M. J. Saffold. The facts will be found in the opinion.

B. F. SAFFOLD, J.—Upon the trial of the appellant for an assault with intent to murder, the evidence tended to show the following state of facts: The accused followed the prosecutor to the steps

¹² Compare with *People v. Moran* and *People v. Jaffe*, supra, *People v. Gardiner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. 741 (reversing 73 Hun 66) where the court held that under the Penal Code definition of extortion (obtaining the property of another with his consent induced by a wrongful use of force or fear) a person may be convicted of an attempt to commit extortion, although the one from whom he sought to obtain money was not influenced by the threats made, but was acting as a decoy for the police; and with the dictum in 73 Hun 66 that if an assault should be made on a man dressed as a woman with intent to ravish, the assailant believing the person assaulted to be a woman, he could not be convicted of an attempt to commit the crime of rape, because in such case the commission of rape would be a legal impossibility. It has been held that where a boy under the age of fourteen is conclusively presumed by law to be incapable of committing rape, he can not be convicted of an attempt to commit it. *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. 846, but see contra *Commonwealth v. Green*, 2 Pick. (Mass.) 380.

of his house, cursing him. As the latter, standing on the portico, was about to enter the room, the accused came up stealthily behind him and seized a gun in his hand, which was loaded, and with a cap on the tube. After a struggle he wrested it from him, and jumping back, presented it at him, snapping it three times, but it did not fire. He examined it deliberately. There was no cap on it. He took from his vest pocket a cap box, which he opened. There were no caps in it, and he went away, carrying the gun with him. After the difficulty was ended, the cap which was proved to have been on the gun was found on the floor of the portico.

In reference to this testimony, the charge of the court, which is rather confusedly set out in the transcript, was, in substance, that the absence of the cap would not avail the defendant, if he supposed it was on the gun; but the jury must be satisfied beyond all reasonable doubt that the defendant did not know there was no cap on the gun. The defendant then asked the charge that he could not be convicted if, when he presented the gun, it was not in a present condition to fire, which was refused.

The authorities agree that to constitute this offense, the ability to kill must concur with the intention to murder. Wharton's Amer. Crim. Law, 1244; *Beasley v. The State*, 18 Ala. 535. But so general a proposition needs some qualification. Some authors insist that the present ability to perform the deed must be commensurate with the intention, both being defeated by some active special cause independent of the offender and the instrument or means attempted to be used.

But so nice a distinction, in offenses so grave, is better calculated to give immunity to the criminal than proper protection to society. To require a perfect adaptedness in the act performed, and in the circumstances surrounding the prisoner at the time, to accomplish what he meant to do, would do away with the doctrine of attempts, as a practical element in the law, almost entirely. Why it is not an attempt to commit larceny because the pocket searched had nothing in it, and it is an attempt to procure miscarriage by unlawfully using an instrument when there is no foetus, presents too slight a difference for public morality. Bishop says: "Assuming the necessary intent to exist, the act must have some adaptation also to accomplish the particular thing intended. But the adaptation need only be apparent; because the evil to be corrected relates to apparent danger rather than to actual injury sustained." "Where the object is not accomplished, simply because of obstructions in the way, or because of the want of the thing to be operated upon, when the impediment is of a nature to be wholly unknown to the offender, who used the appropriate means, the criminal attempt is committed." "If in matter of fact some circumstance attends the particular instance, unknown to the offender, which circumstances is only special

to the instance, and not ordinarily attending similar cases, the failure of the offender to do the thing intended, through the intervention of this circumstance, prevents not his act from being indictable. It is then an attempt, precisely as if, the circumstance not intervening, it would have been an executed substantive crime. If the attempt consists in discharging a ball from a gun into a dwelling house believed to be inhabited, while in truth no person is in the house; or in sending a challenge to one whose principles will not permit him to fight; or in doing any other thing which fails by reason of some such casual obstacle intervening, the attempt is complete, since there is created the apparent insecurity against which the criminal law protects the public." He doubts the soundness of an Indiana decision that an indictment could not be maintained where one shot at another with intent to murder, the gun containing nothing but powder and cotton wad, though the person shooting believed it to contain a bullet. The distance was forty feet. 1 Bishop's Crim. Law, §§ 668-693. The charge given was correct, and the one asked was properly refused. It was sufficiently proved that the prosecution was not barred by limitation, and the charge asked on that point was incorrect.

But there is one error shown by the record for which the judgment must be reversed. It does not appear that the defendant was asked by the court if he had anything to say why sentence should not be passed upon him. In felonies, as defined by our statutes, this is necessary. *Crim v. The State*, 43 Ala. 43.¹³

Reversed.

PEOPLE v. LEE KONG.

1892. SUPREME COURT OF CALIFORNIA. 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. 165.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.

The facts are stated in the opinion of the court.

GAROUTTE, J.¹⁴—Appellant was convicted of the crime of an assault with intent to commit murder and now prosecutes this appeal, insisting that the evidence is insufficient to support the verdict.

The facts of the case are novel in the extreme, and when applied to principles of criminal law, a question arises for determination upon which counsel have cited no precedent.

¹³ Accord: *People v. Ryan*, 55 Hun (N. Y.) 214, 27 N. Y. St. 916; *St. 916*; *Kunkle v. State*, 32 Ind. 220; but see *Henry v. State*, 18 Ohio Rep. 32.

¹⁴ Part of the opinion is omitted.

A policeman secretly bored a hole in the roof of appellant's building, for the purpose of determining, by a view from that point of observation, whether or not he was conducting therein a gambling or lottery game. This fact came to the knowledge of appellant, and upon a certain night, believing that the policeman was upon the roof at the contemplated point of observation, he fired his pistol at the spot. He shot in no fright and his aim was good, for the bullet passed through the roof at the point intended; but very fortunately for the officer of the law at the moment of attack he was upon the roof at a different spot viewing the scene of action, and thus no substantial results followed from appellant's fire.

The intent to kill is quite apparent from the evidence, and the single question is presented, Do the facts stated constitute an assault? Our criminal code defines an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." It will thus be seen that to constitute an assault two elements are necessary, and the absence of either is fatal to the charge. There must be an unlawful attempt and there must be a present ability to inflict the injury. In this case it is plain that the appellant made an attempt to kill the officer. It is equally plain that this attempt was an unlawful one. For the intent to kill was present in his mind at the time he fired the shot, and if death had been the result, under the facts as disclosed, there was no legal justification to avail him. The fact that the officer was not at the spot where the attacking party imagined he was, and where the bullet pierced the roof, renders it no less an attempt to kill. It is a well-settled principle of criminal law in this country, that where the criminal result of an attempt is not accomplished, simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket or to steal from his person when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny. (State v. Wilson, 30 Conn. 500; Commonwealth v. McDonald, 5 Cush. 365; People v. Jones, 46 Mich. 441; People v. Moran, 123 N. Y. 254.)

* * * * *

In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part; neither did the officer escape by reason of the fact of his being so far dis-

tant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault. These acts disclose an assault to murder as fully as though a person should fire into a house with the intention of killing the occupant, who fortunately escaped the range of the bullet. (See *Cowley v. State*, 10 Lea 282.) The fact that the shots were directed indiscriminately into the house rather than that the intended murderer calculated that the occupant was located at a particular spot, and then trained his fire to that point could not affect the question. The assault would be complete and entire in either case. If a man intending murder, being in darkness and guided by sound only, should fire, and the bullet should pierce the spot where the party was supposed to be, but by a mistake in hearing the intended victim was not at the point of danger, but some distance therefrom, and yet within reach of the pistol ball, the crime of assault to commit murder would be made out, for the unlawful attempt and the present ability are found coupled together. If appellant's aim had not been good, or if through fright or accident when pointing the weapon or pulling the trigger, or if the ball had been deflected in its course from the intended point of attack and by reason of the occurrence of any one of these contingencies the party had been shot and killed, a murder would have been committed. Such being the fact, the assault is established.

The fact of itself that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant at the time the shot was fired is immaterial upon this question. That element of the case does not go to the question of present ability, but pertains to the unlawful attempt.

Let the judgment and order be affirmed.

PATTERSON, J., concurred.

HARRISON, J., concurring. I concur in the judgment upon the ground that upon the evidence before them the jury have determined that the unlawful attempt of the defendant was coupled with a present ability—that is, an ability by the means then employed by him in furtherance of such attempt—to commit murder upon the policeman.

CHAPTER V.

CONSPIRACY.

"The definition of conspiracy in the old books is much too narrow for the construction of this offense in modern times. Lord Coke describes it as 'a consultation and agreement between two or more to appeal or indict an innocent person falsely and maliciously, whom accordingly they caused to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men.' 3 Inst. 148. Hawkins, indeed, disputes this last clause, and maintains that a writ of conspiracy might be supported though there was no acquittal by verdict. Hawk, P. C., c. 72, § 2. But Blackstone confines the offense to malicious accusations and enters into the discussion of no other species of confederacy. 4 Bl. Com. 136. In Jacob's dictionary also the law is considered with reference only to this particular object. Jac. Dic., Conspiracy. At the present day, however, the meaning of the offense is certainly far more extensive; and although a plan to indict an innocent person is one of the worst kinds of conspiracy, the offense is manifestly by no means confined to this alone. * * * In a word, all confederacies wrongfully to prejudice another are misdemeanours at common law, whether the intention is to injure his property, his person, or his character. Hawk., P. C., c. 72, § 2.

"But the object of conspiracy is not confined to an immediate wrong to particular individuals; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act in itself illegal." 3 Chitty Criminal Law, 1138-1139.

REGINA v. PARNELL ET AL.

1881. HIGH COURT OF JUSTICE IN IRELAND, QUEEN'S BENCH DIVISION. 14 Cox. Cr. C. 508.

Information by Her Majesty's attorney-general for Ireland against Charles Stewart Parnell, M. P.; John Dillon, M. P.; Joseph Gillis Biggar, M. P.; Timothy Daniel Sullivan, M. P.; Thomas Sexton, M. P.; Patrick Egan, Thomas Brennan, M. M. O'Sullivan, M.

P. Boyton, P. J. Sheridan, P. J. Gordon, M. Harris, J. W. Walsh and J. Nally.

The following charge was delivered to the jury by

FITZGERALD, J.¹—The second charge, as I have told you, is that of a conspiracy to incite tenants when dispossessed for nonpayment of rent to retake possession by force, which is in itself a crime; for the forcible retaking of possession of that which the law awarded by its judgment is by the common law and the statute law a crime. It is one of the things provided for by what is called the Whiteboy Code, passed by the parliament of Ireland, and re-enacted by the parliament of Great Britain in a modified and much more temperate form, and relieving it from capital punishments with which the code was formerly disfigured. To incite persons to prevent others from taking or occupying farms from which others have been evicted for nonpayment of rent is an offence at common law. Again, a combination to prevent persons buying goods taken in execution is an offence at common law, and I can not help denouncing it as a crime if the means to carry out these indictments were those commonly known as boycotting. Now, having dealt thus shortly with the information, let me unfold to you what the law of conspiracy is and how it bears on the case. * * * It may be that the counts, or some of the counts, in this information are bad in point of law, and if so it will be open to the defendants to appeal to the House of Lords. But what we have to consider here is the law of conspiracy as laid down in the O'Connell case. * * * In delivering the opinion of the judges of England to the House of Lords, Tindal, C. J., told them: "The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing." I have pointed out to you that in one at least of its objects this confederacy, if proved, was not alone illegal but a crime. Again he says: "If two or more should agree to effect by improper means something which may be in itself indifferent or unlawful." Now such is the plain language in which Tindal, C. J., lays down the law. Plain and clear, and in every word applicable to the case now before the court. Again, in another case before the House of Lords, one of those formerly known as the Fenian cases, in which a person named Mulcahy had been convicted of the crime of treason felony, the same question was raised. He was tried at the Commission Court here and, the conviction had, it was brought into the court of Queen's Bench where the decision was confirmed. A writ of error was allowed by the attorney-general of the day to the House of Lords and the case was fully discussed there. It became essential to discuss there what the law of conspiracy was and the judges were again called in. Their opinion was delivered by one now no more,

¹ The statement of facts, and part of the opinions of Fitzgerald, J., and Barry, J., are omitted.

but of whom we are all proud, the late Willes, J., and he, in stating the opinion of the judges, says: "A conspiracy consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." By the terms illegal and unlawful it is not intended to confine the definition to an act that would in itself be a crime or an offence; but that law extends to and may embrace many cases in which the purposes of a conspiracy, if done by one only, would not be a criminal act, as for instance, if several combined to violate a private right, the violation of which would be wrongful if done by one, though not in itself criminal. If, for instance, a tenant withholds his rent, that is a violation of the right of his landlord to receive it, but it would not be a criminal act in the tenant, though it would be the violation of a right; but if two or more incite him to do that act their agreement so to incite him is by the law of the land an offence. Conspiracy has been aptly described as divisible under three heads—where the end to be attained is in itself a crime; where the object is lawful, but the means to be resorted to are unlawful; and where the object is to do injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime. I think under these three heads every class of conspiracy ranks. And, gentlemen, I have to declare to you that it is a criminal act where two or more agree to have a crime committed; where two or more agree to effectuate their object by unlawful means, or where two or more agree to do an injury to a third party or to a class, though that injury, if done by any one alone of his own motion, would not be in him a crime or an offence, but would be simply an injury carrying with it a right to civil remedy. No. 1, that is the first definition where the end to be obtained is criminal, speaks for itself. One at least of the charges against the defendants is that they conspired to advise that to be done which in itself was a crime, namely, forcibly to retake possession of the land which the law had awarded to the landlord. Of No. 2, the illustration commonly given—I give the illustration to enable you to understand it—is, we will say, A. B. has a right to real property, and two or three agree to support him in that right, so far their action is proper, to support him in the right which he really had. They agree to give him that support by unlawful means, that is, by the procuring of some fabricated evidence; the agreement to do that by unlawful means makes No. 2 an offence. As to No. 3 it is not inaptly illustrated by *Reg. v. Druitt* (10 Cox C. C. 592). In that case, Baron Bramwell says, "The public had an interest in the way in which a man disposed of his industry and his capital; and if two or more persons conspired by threats, intimidation or molestation to deter or influence him in the way he should employ his talents or his capital, they would be guilty of an indictable offence," and he adds emphat-

ically "that is the common law of the land." And I tell you it is the common law of the land—if two or three agree amongst themselves to inflict or to procure an injury to be inflicted upon a third party. In the case I have last adverted to the agreement to effect an injury or wrong to another by two or more persons is constituted an offence, because the wrong to be effected by a combination assumes a formidable character. When done by one alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of the combination. And it is justly so because, though you may assert your rights against one individual, how can you defend your rights against a number of persons combined together to inflict a wrong on you. Again, there is a definition very simple in itself which is given in a book of practice, and which is applicable to the present case, Archbold's Criminal Law. He says, "Conspiracy is an agreement of two or more wrongfully to injure a third person, or to injure any body of persons." You see the simplicity of that, that a conspiracy is an agreement by two or more wrongfully to injure a third party, or any body of persons. And again, Mr. Roscoe, in his book on Criminal Law, sums up the result thus: "All the authorities in effect come to this, that a conspiracy is an agreement between two or more persons to do that which is unlawful, and it is unlawful to agree to accomplish an injury to a third person, or body of persons." Some observations have been addressed to you in the course of this case and have been often repeated to the effect that there has been no proof given that the defendant ever met or entered into or became parties to any agreement or confederacy or conspiracy, and that two of the defendants were not even members of the Land League. Mr. Macdonogh, in his able address, enforced this particularly. But I have now to inform you, as part of the law of conspiracy, there is no necessity that there should be express proof of a conspiracy such as that the parties actually met and laid their heads together and then and there actually agreed to carry out a common purpose. Nor is such proof usually attempted. Again, adverting to Mulcahy's case (L. Rep. 3, H. of L. 306), the same great judge I have quoted (Mr. Justice Willes), says: "So far as proof goes, conspiracy, as Grose, J., says, in *Rex v. Brissac* (4 East 171), is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." It may be that the alleged conspirators have never seen each other, and have never corresponded, one may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement.

* * * The agreement to effect a common object is usually an inference to be deduced by the jury, as men of common sense, from the acts of the alleged conspirators in furtherance of their purpose; and that will be your great duty upon the present case, to investigate

the evidence before you. Again it has been suggested that secrecy was to some extent an essential of conspiracy, and your attention has been repeatedly called to this that the proceedings of the defendants were all above board, that they were unconcealed, that they were not carried on in the dark, and that there could be no guilty conspiracy, because it was done openly and above board. But I have to inform you in point of law that though secrecy is frequently a characteristic of conspiracy, it forms no essential element of the crime. The crime of conspiracy may be complete, though all the proceedings of the confederates have been open and above board and unconcealed. * * * In point of law secrecy or darkness forms no element in the crime of conspiracy. This law of conspiracy is not an invention of modern times. It is part of our common law; it has existed from time immemorial. It is necessary to redress classes of injuries which at times would be intolerable, and but for it would go unpunished. If the defendants have broken the law in the manner alleged in the information, there is no law of this land by which they could be reached but by the law of conspiracy. It has been said that this law has been in England entirely disused. But that is untrue; it is a law repeatedly put in force. It is seldom resorted to in political trials, but in a political trial such as the present, if the defendants have broken the law, their offence can only be reached by the common law indictment for conspiracy. Again, a great deal has been said in the way of illustration as to conspiracy to effect objects which would not be criminal in themselves, and you were above all referred to the action of trades' unions. But the action of trades' unions which is now regulated by statute is totally and essentially different from the charge which is here made against the defendants. Workmen may agree in common not to work unless they are paid certain prices. The same in the case of the employers of labour. They may agree not to take men into their employment unless at certain rates, and they are free to do that. But see how different the circumstances are. A man or a body of men may say "We won't give our labour unless we are paid in a certain way," or a body of employers, "We can not give employment profitable to ourselves unless you work at a certain rate." How different to the case before us, for the combination alleged here is an agreement to incite farmers who have agreed to pay certain rents, not to pay them, and not alone not to pay the rents which they have contracted to pay, but to keep the farms by force and against the law of the country. There is no analogy between the two cases. One does not bear at all upon the other, and I ask you to dismiss that illustration from your mind. Now, gentlemen, I have done with this important law of conspiracy.

The learned judge having completed his charge to the jury (the

remaining portions of which are immaterial for the purposes of this report), the jury retired.

MACDONOUGH, Q. C., for the traversers.—I object to the third statement of your lordship in relation to conspiracy. The vagueness of the second and third of these propositions leaves so broad a discretion in the hands of the judge that it is hardly too much to say that plausible reasons may be found for declaring it to be a crime to combine to do almost anything which the judges regard as morally wrong, or politically or socially dangerous. I think that when the third division of the heads of conspiracy which your lordship gave and enunciated to the jury, comes to be considered, it amounts to this that an innocent act, if agreed to be done by two or more persons would virtually become a guilty conspiracy.

FITZGERALD, J.—I laid down no such proposition.

* * * * *

BARRY, J.—With reference to the first, the main branch of the objection to the charge by Mr. Macdonough, I am of opinion that he has the remedy of appeal by writ of error if anything erroneous has been stated, and I am of opinion as to the charge of my learned brother, as to the manner in which he has laid down the law of conspiracy, every objection to that charge appears on the record; and to say that the charge is objectionable is, in other terms, to say that the information is vicious on the face of it. The law of conspiracy in late years has undergone very considerable alteration, especially with reference to trade unions in England, and the consideration of the subject was referred to a very remarkable commission indeed, * * * and in their second report the following exposition of the law of conspiracy was given. Of course, it has not the binding authority of a court of co-ordinate jurisdiction upon us. Still, coming from such a source, it must be regarded as a highly authoritative statement of the law. It would seem that two extreme opinions were put forward as to the law on this point, and that is not a matter of surprise when politics become more or less involved in the legal controversy. The one proposition was that an act perfectly innocent in itself, if it be carried out by perfectly innocent means, might, if two or more persons combined to carry it out, become criminal. The other was the proposition I understand Mr. Macdonough to put forward now as his contention in this case, namely, that there could be no indictable conspiracy unless the thing to be done or the means by which the thing was to be done were in themselves criminal; that would constitute a crime and be the subject-matter of an indictment for a prosecution. Now, as to the first of these propositions, I do not think it necessary to discuss it further (I do not think it has any application to this case) than to say I should be very slow to adopt such a view of the law. I think there must be necessarily in

the law of conspiracy considerable vagueness and uncertainty, which in many respects is contrary to our law, and I agree with Mr. Macdonough that it should be administered with very great care, and not extended beyond the limits it has gone; therefore, if I had to pronounce a definite opinion I should be clearly of opinion that a combination to do an act innocent in itself by innocent means does not constitute an indictable conspiracy. As regards the second proposition, however, which has been so often mooted, namely, that the thing to be done must be criminal, or the means to be used must be criminal. With reference to that I am not prepared to adopt that view of the law, because I think the weight of modern authority is against it. I shall not refer any further to the cases cited by my brother, Fitzgerald, and again referred to by Mr. Macdonough; but I shall now read this very lucid exposition of the law of conspiracy laid down by that most distinguished commission, a commission deserving, in the sense in which Mr. Macdonough would put it, a greater amount of popular confidence than the decision of a mere court of lawyers, and presided over by so distinguished a man as the late Lord Chief Justice Cockburn: "The law protecting the relation of master and servant, employer and employed, from interference by third parties is supplemented by the common law relating to conspiracy. This law becomes applicable not only where two or more persons combine to do any act which is in itself an offence, and would be criminal if done by any one of them, but also in many instances in which the act which is the purpose of the conspiracy, if done by one, would not be criminal; as, for instance, where several, with the malicious intention to injure, combine to violate a private right, the violation of which by a single individual, though not criminal, would be wrongful, and would give a right of civil action to the party aggrieved. We are directed to consider whether it is desirable to limit or define this law either generally or as affecting the relation of masters and workmen." He then goes on to say, "Conspiracy may be divided into three classes: first, where the end to be accomplished would be a crime in each of the conspiring parties, a class which offers no difficulty. Secondly, where the purpose of the conspiracy is lawful, but the means to be resorted to are criminal as where the conspiracy is to support a cause believed to be just by perjured evidence. Here the proximate or immediate intention of the parties being to commit a crime, the conspiracy is to do something criminal, and here again the case is consequently free from difficulty. The third and last case is where with a malicious design to do an injury, the purpose is to effect a wrong, though not such a wrong as when perpetrated by a single individual, would amount to an offence under the criminal law. Thus an attempt to destroy a man's credit, and effect his ruin by spreading reports of his insolvency would be a wrongful act which would entitle the party whose credit was thus

attacked to bring an action as for a civil wrong, but it would not be an indictable offence. If it be asked on what principle a combination of several to effect the like wrongful purpose becomes an offence, the answer is, upon the same principle that any other civil wrong, when it assumes a more aggravated and formidable character, is constituted an offence, and becomes transferred from the domain of the civil to that of the criminal law. All offences, it need hardly be observed, are either in their nature offences against the community, or are primarily offences against individuals. As regards the latter case, every offence against person or property, or other individual right involves a civil wrong, which would have entitled the person injured to civil redress were it not that owing to the aggravated nature of the wrong and the general insecurity to society which would ensue from such acts, if allowed to go unpunished, the state steps in, and merging the wrong done to the party immediately interested in the larger wrong done to the community, converts the wrong done by the infraction of individual right into a crime, and subjects the wrongdoer to punishment to prevent as far as possible the recurrence of the offence. Thus the dividing line between private wrongs, as entitling the party injured to civil remedies, and private wrongs thus converted into public wrongs, in other words into offences and crimes, is to be found in the more aggravated and formidable character which the violation of individual rights under given circumstances assumes. It is upon this principle that the law of conspiracy, by which the violation of private right, which if done by one, would only be the subject of civil remedy, when done by several is constituted a crime, can be vindicated as necessary and just. It is obvious that a wrongful violation of another man's right committed by many assumes a far more formidable and offensive character than when committed by a single individual. The party assailed may be able by recourse to the ordinary civil remedies to defend himself against the attacks of one. It becomes a very different thing when he has to defend himself against many combined to do him injury. To take the case put by way of illustration, that of false representations made to ruin a man's business by raising a belief of his insolvency, such an attempt made by one might be met and repelled. It would obviously assume very different proportions and a far more formidable character if made by a number of persons confederated together for the purpose, and who should simultaneously and in a variety of directions take measures to effect the common purpose. A variety of other instances, illustrative of the principle, might be put. The law has, therefore, and it seems to us wisely and justly established that a combination of persons to commit a wrongful act with a view to injure another, shall be an offence, though the act if done by one would amount to no more than a civil wrong. We see no rea-

son to question the propriety of the law as thus established, nor have we any reason to believe that in its general application it operates otherwise than beneficially." It seems to me that that is an extremely lucid and able exposition of the law coming from a most authoritative source. If that law be erroneous as there laid down, if it should be found objectionable on public or political grounds, it is for the legislature to interfere. At present I do not think this court has authority to interfere.

FITZGERALD, J.—I would only add to what my learned brother has said, as the objections were very much an appeal from what I have said, I entirely concur in what he has said.

The jury were unable to agree and were discharged.²

STATE v. BACON.

1905. SUPREME COURT OF RHODE ISLAND. 27 R. I. 252, 61 Atl. 653.

Indictment charging conspiracy. Heard on demurrer and demurrer overruled.

DUBOIS, J.²—This is an indictment for conspiracy in two counts, charging that Floyd C. Lewis and Harry McKay, of East Providence, and Herbert J. Bacon, of Providence, in said county, on the tenth day of May, 1903, with force and arms, at East Providence, in the aforesaid county of Providence, "Unlawfully and fraudulently did combine, confederate and conspire together by divers unlawful and fraudulent devices and contrivances and by divers false pretences, unlawfully to obtain from the Rhode Island Company, a corporation duly chartered and organized under the laws of the state of Rhode Island, the sum of one thousand dollars of the property and money of the said The Rhode Island Company, against the form of the statute in such case made and provided and against the peace and dignity of the state."

"And the jurors aforesaid upon their oaths aforesaid, do further present that the said Floyd C. Lewis and the said Harry McKay and the said Herbert J. Bacon, on the tenth day of May in the year of our Lord one thousand nine hundred and three, with force and

² In *Commonwealth v. Ward*, 92 Ky. 158, 17 S. W. 283, the following definition of conspiracy was given by Chief Justice Holt: "A criminal conspiracy is a corrupt combination of two or more persons by concerted action to do an unlawful act, or an act not unlawful by unlawful means; or an act which would tend to prejudice the general public. Overt acts are not necessary to the consummation of the offense."

By statute in many states, an overt act is made an essential element of the crime of conspiracy.

³ Part of the opinion is omitted.

arms at East Providence, in the aforesaid county of Providence, being evil disposed persons and willfully devising and intending to cheat and defraud The Rhode Island Company, a corporation duly chartered and organized under the laws of the state of Rhode Island, did unlawfully conspire, combine and agree together, by devices, false pretenses and subtle means and devices, knowingly, designedly and fraudulently to cheat and defraud the said corporation out of a large amount of money, to-wit, money to the amount of and of the value of one thousand dollars of the property and money of the said The Rhode Island Company, and the jurors aforesaid do further present that the said defendants in pursuance of the aforesaid conspiracy and agreement between them as aforesaid, on, to wit, the ninth day of February, in the year of our Lord one thousand nine hundred and four, with intent to obtain said sum of money from the said corporation and to cheat and defraud it, The Rhode Island Company, as aforesaid, did cause and procure an action of law to be commenced and prosecuted in the name of the said Floyd C. Lewis in the Common Pleas Division of the Supreme Court of said state of Rhode Island, holden within and for said county of Providence against the said The Rhode Island Company, in which said action of law the said defendants, Floyd C. Lewis, Harry McKay and Herbert J. Bacon, did falsely, unlawfully and fraudulently state and charge that the said Floyd C. Lewis, while a passenger in a certain street car operated by said The Rhode Island Company, on, to-wit, the tenth of May, in the year of our Lord one thousand nine hundred and three, was injured by the derailment of said car, whereas in truth and in fact the said Floyd C. Lewis was not a passenger in said car on the said tenth day of May, in the year of our Lord one thousand nine hundred and three, and was not injured by the derailment of said car as they, the said Floyd C. Lewis and the said Harry McKay and the said Herbert J. Bacon then and there well knew, against the form of the statute in such case made and provided and against the peace and dignity of the state." * * *

The first count of the indictment charges the defendants with conspiring to cheat, by false pretences, a certain corporation out of one thousand dollars of its property. And the second count charges the defendants with a conspiracy to obtain from the corporation one thousand dollars of its property by means of an unfounded and fraudulent law suit. The first charges an unexecuted conspiracy to cheat and defraud, and the second charges a conspiracy to pervert the course of justice; and both kinds of confederation are indictable offences well known to the law.

A conspiracy is a confederation to do something unlawful, either as a means or an end. See Wharton's *Crim. Law* (9th ed.), § 1337; 8 *Cyc.*, "Conspiracy;" 2 *Bish. New Crim. Law*, §§ 171, 175;

Commonwealth v. Waterman, 122 Mass., p. 57; 1 Bouvier's Law Dic., 408; 6 Am. & Eng. Ency. L. 832; Russ., Crimes, § 674; *State v. Buchanan*, 5 Har. & Johns. 317, 9 Am. Dec. 534. The word "unlawful" as used in this definition includes the breach of civil as well as of criminal law, 2 Bish. Crim. Law, § 178; *Reg. v. Warburton*, Law Rep., 1 C. C. 274; Bish. Direct. & Forms, § 291. The offence thus defined excludes only confederations to accomplish lawful objects by lawful means; the offence includes all possible unlawful confederations. As it includes all it can not be made to include more. Conspiracy is not a statutory crime or misdemeanor in Rhode Island. It is well settled that it is an offence of common-law origin. It is not founded upon statutes, and requires no legislative aid. The common-law offence can not be enlarged by legislation, and the only effect that statutory interference can have upon it must be to restrict or abridge it.

We are unable to agree with the contention that the statute, 33 Edw. 1, de conspiratoribus, constitutes the foundation of the English law of conspiracy; on the contrary, we find ourselves fully in accord with the able opinion of Buchanan, J., in *State v. Buchanan*, 5 Harris & Johns. 317, the leading American case upon the subject of criminal conspiracy, and with the conclusions of the court upon a full review of the cases: "From all which it results, that every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offence, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent, and makes no ingredient of the crime and therefore need not be stated in the indictment."

"When parties have once agreed to cheat a particular person of his money, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete." Bayley, J., in *Rex v. Gill*, 2 B. & Ald. 204. "The offence does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means." Lord Mansfield in *Rex v. Eccles*, 1 Leach 274.

In this state the offence of being a common cheat is punishable under Gen. Laws 1896, ch. 281, § 24. But individual cheating or obtaining money or property from another with intent to defraud is not a criminal offence unless the false pretence is in writing or unless the property is obtained by a privy or false token within the provisions of *Idem*, ch. 279, § 15, nor was it an offence at common law. *State v. Mayberry*, 48 Me. 218; *State v. Hewett*, 31 Me. 396; *State v. Jones*, 13 Iowa 269; *Commonwealth v. Eastman*, 1 Cush.

189. But although individual cheating was not an offence at common law, a conspiracy to cheat and defraud another was indictable. In this country there is a conflict of opinion upon this question; some courts following the opinion of the court expressed in *State v. Buchanan*, *supra*, and others holding the views set out in *Commonwealth v. Eastman*, *supra*. In the first case it was held that a conspiracy to cheat and defraud was indictable at common law, and therefore it was not necessary to state the means in the indictment, as the object of the conspirators was to accomplish a common-law offence. In the latter case it was held that it was not indictable at common law to conspire to cheat and defraud, unless the means resorted to were criminal and that therefore the end not being criminal the means must be set forth in order to display the criminality of the act charged. We prefer to be classed with the cases led by *State v. Buchanan* rather than to subscribe to the doctrine that the form used in the present indictment is insufficient because it does not charge a conspiracy to cheat and defraud by criminal means.

In England forms of indictment similar to that employed in the first count of the indictment before us have been sustained, for the following reasons: "The gist of the offence is the conspiracy; and, although the nature of every offence must be laid with reasonable certainty, so as to apprise the defendant of the charge, yet I think that it is sufficiently done by the present indictment. It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together and might determine and resolve that they would, by some trick and device, cheat and defraud another without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would, nevertheless, constitute an offence. If, therefore, a case may be reasonably suggested in which the matters here charged would, if there were nothing more, be an offence against the law, it is impossible, as it seems to me, to conclude that the law should require the particular means to be set forth. The offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy." *Abbott, C. J.*, in *Rex v. Gill*, *supra*. In *Reg. v. Gombertz*, 9 Q. B. 824, *Lord Denman, C. J.*, said, in giving the opinion of the court: "First, we think that there is no ground for arresting the judgment in this case; one count is good, on the authority of *R. v. Gill*, never overruled, but founded on excellent reason and always recognized, though not without regret, because that form of indictment may give too little information to the accused."

The difficulty suggested, however, is only similar to that which occurs in other prosecutions where, of necessity, the indictment must be drawn in general terms and may be remedied to some extent in proper cases by a bill of particulars whenever the court in its dis-

cretion may order it. See 2d ed. Bish. Crim. Proc., § 209. In our opinion, therefore, the first count of the indictment is sufficient in form.

As to the second count, which charges a conspiracy to pervert or obstruct justice, it charges an offence recognized by the common law. "Any confederacy or combination, the purpose of which is to obstruct the due course of justice or the due administration of the laws, is an indictable conspiracy." 8 Cyc. 634. *State v. Ripley*, 31 Maine 386. "All conspiracies which have for their object the perversion or obstruction of public justice have been, from the earliest times, regarded as indictable." 6 Am. & Eng. Ency. L. (2d ed.) 856; *State v. Burnham*, 15 N. H. 396; *State v. Norton*, 3 Zabriskie 33; *The People v. Chase*, 16 Barbour 495; *Commonwealth v. Douglass*, 5 Metc. 241; *State v. Noyes et al.*, 25 Vt. 415.

Conspiracy to obtain money from an individual or a corporation is a crime well known to and recognized by the law. *State v. Buchanan*, *supra*. It is unnecessary to wait for the determination of the action at law before charging conspiracy. Prosecutions for conspiracy are preventive rather than curative measures. To constitute the crime of conspiracy it is not necessary that the conspirators should succeed. *The State v. Norton*, *supra*; *The People v. Chase*, *supra*. It is not necessary to aver that the object of the conspiracy has been accomplished. *State v. Bruner*, 135 Ind. 419, 35 N. E. 22; *Shircliff v. State*, 96 Ind. 369; *Miller v. State*, 79 Ind. 198; *State v. Straw*, 42 N. H. 393; *United States v. Newton* (D. C.), 48 Fed. 218. It is unnecessary to aver that the defendant, Bacon, maliciously and with malice aforethought entered into the conspiracy. The words "malice aforethought" are extremely technical and would be inappropriate in charging this class of offenses. The insufficiency of the means intended to be adopted does not render the offense incomplete. The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or a lawful act for an unlawful purpose, though nothing be done in prosecution of it; the offense being complete when the confederacy is made. * * *

Demurrer overruled and case remitted to the Common Pleas Division for further proceedings.

STATE v. STOCKFORD.

1904. SUPREME COURT OF ERRORS OF CONNECTICUT. 77 Conn. 227, 58 Atl. 769, 107 Am. St. 28.

Prosecution for conspiracy, brought to the Superior Court in New Haven county and tried to the jury before Shumway, J.; verdict

and judgment of guilty and appeal by the accused. No error.

The information contains six counts charging conspiracies to injure as many different parties, each of which is alleged to have been committed by the eight named defendants.

In the first three counts the defendants are described as being the officers, agents and members of an association or labor union known as "Local 340 of the Team Drivers' International Union," and in the remaining counts as the officers, agents and members of a labor union known as "Local No. 483, Carriage Drivers' Union of the City of New Haven, Connecticut."

The first count charges that said defendants and other unknown persons on the 18th of April, 1903, unlawfully and maliciously conspired and agreed together to compel the Peck & Bishop Company, a corporation located in New Haven and engaged there in the business of trucking, and employing a large number of teamsters who were members of said "Local 340," and the officers and agents of said Peck & Bishop Company, against their will, to execute and enter into the following agreement with said association and the members thereof:

"AGREEMENT BETWEEN THE MASTER TEAMSTERS OF THE CITY OF NEW HAVEN AND VICINITY AND THE MEMBERS OF LOCAL 340 OF THE TEAM DRIVERS' INTERNATIONAL UNION.

"Article I. Party of the first part agrees to employ as teamsters none but members of Local 340, or those who are willing to become members at the next regular meeting. Article II. It is further agreed that no objections shall exist on the part of the employes to the conditions of this contract for a stipulated time from date herein named. Article III. Each and every member of Local 340 shall be treated in a fair and impartial manner, and shall suffer no persecution because of his union principles or affiliation with organized labor. Article IV. This Local shall at all times have at heart the interest and welfare of its employers' business and every member is expected to acquit himself in an honorable and straightforward manner, leaving as little as possible for criticism. Article V. If any employer becomes dissatisfied with the services of any member of this Local, such member shall be given a chance to hear charges by employer, and shall be heard in his own behalf before dismissal; and any member found guilty of violating this agreement shall be fined, suspended, or expelled from Local 340, according to the option of the Local. Article VI. Ten hours to constitute a day's work. Article VII. All members driving one horse shall receive not less than \$10.50 per week, six days to constitute a week's work. Two-horse drivers shall receive not less than \$12 per week, six days to constitute a week's work. Four-horse drivers to receive not less than \$13.50 per week, six days to constitute a week's work. All members to receive time and one-half for all overtime. Article

VIII. Under no circumstances will any member of Local 340 work July 4, Labor Day, or Christmas, unless absolutely necessary. Teams to be taken care of on such days free of charge, if necessary. If members of Local 340 work on said holidays they shall receive double time for same. Article IX. This agreement to remain in effect for the term of one year from the 1st day of May, 1903, unless altered by the consent of both parties affected.

“_____, For Local 340.”

It is further alleged in the first count, that as a part of said conspiracy the defendants agreed together upon the following unlawful methods and means by which to accomplish said purpose of the conspiracy: (1) that the defendants and their unknown associates would cause, induce and persuade all the employees of the Peck & Bishop Company to strike, and leave the employment of said company; (2) that they would place pickets near the places of business of said company, who would by threats and intimidation prevent persons from continuing or entering into the employment of said company; (3) that they would threaten and intimidate the business customers of said company and force and compel them to give up all business relations with said company; (4) that they would by threats, intimidation and persuasion compel the members of said association and of other associations and labor unions to refrain from employing said company and from employing or trading with those who employed said company; (5) that they would prevent said company from carrying on its business and would ruin and destroy the business and property of said company; and that in pursuance of said conspiracy the defendants and their said associates performed said acts so agreed upon as the methods of accomplishing the purpose of said conspiracy. * * *

HALL, J.⁴—The information alleges a combination of the defendants and others; the purpose to be effected by the combination; the acts by which that purpose was to be accomplished; and the performance of such acts. The allegations as to these subjects are the same in the several counts, excepting that two different agreements were presented to be executed, and that they were to be signed by different parties. By these allegations but a single offense is described in each count, namely, a criminal combination to procure a certain agreement to be signed by certain described methods.

A combination of persons for the accomplishment of a particular object may be criminal, either because the object itself is criminal in its character, or because the means by which that object is to be effected are criminal. *State v. Gannon*, 75 Conn. 206, 210.

The agreements which the defendants sought to have signed contain no provisions which are contrary to the criminal law of this

⁴ Part of the statement of facts and of the opinion are omitted.

state, and if the only purpose of the combination was to procure these agreements to be entered into in order to advance the legitimate interests of the employes of the team owners and liverymen, without the view of injuring the business and property of their employers, such purpose was not criminal.

If the alleged purpose of the combination was not criminal, were the methods to be pursued criminal? It is alleged that the defendants maliciously conspired to compel the employers to sign the agreements. It is not alleged that it was intended to directly threaten the employers to induce them to sign the agreements, nor does it appear that they were directly threatened. The information states how they were to be compelled—and we think it is in effect alleged that they were to be compelled only by the particular methods described in the information—the first of which is by inducing the workmen, by concerted action, to strike and leave the employment of the employers named. Such a strike may be lawful, or it may be unlawful and criminal. Whether it is lawful or not depends upon its object and the manner in which it is conducted. A combination to cause a strike for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property without just cause, is both unlawful and criminal. 1 Eddy on Combinations, § 521 et seq.; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Arthur v. Oakes*, 63 *ib.* 310; *Plant v. Woods*, 176 Mass. 492, 498; *State v. Stewart*, 59 Vt. 273, 289; *State ex rel. Durnet v. Huegin*, 110 Wis. 189; *Doremus v. Hennessy*, 176 Ill. 608; *State v. Glidden*, 55 Conn. 46, 71. A combination which contemplates the use of force, threats, or intimidation, to induce workmen to abandon together the service of their employers, is criminal (authorities above cited), and a combination for that purpose is also criminal because it is to induce the commission of an offense which is made criminal by statute.

Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner and not under such circumstances as to wantonly or maliciously inflict injury to person or property. 1 Eddy on Combinations, § 521; *Rogers v. Evarts*, 17 N. Y. Supp. 264; *Farmers Loan & Trust Co. v. Northern Pacific R. Co.*, 60 Fed. Rep. 803.

A combination to use the second, third and fourth alleged methods of obtaining the execution of the agreement is a combination to compel workmen and others, by threats and intimidation, to refrain from doing that which they have a legal right to do, and is criminal.

The use of such means is made a criminal offense by § 1296 of the General Statutes, which provides that "every person who shall threaten, or use any means to intimidate any person to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure, or threaten to injure, his property, with intent to intimidate him, shall be fined not more than one hundred dollars, or imprisoned not more than six months."

A combination to use the fifth alleged means, by preventing such employers from carrying on business and ruining and destroying their business and property, is equally criminal both at common law (see authorities above cited) and under the statute quoted.

The language or conduct which will constitute the unlawful use of threats or means to intimidate, need not be such as to induce a fear of personal injury. Any words or acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business or property, are equivalent to threats. *State v. Donaldson*, 32 N. J. L. 151; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Crump v. Commonwealth*, 84 Va. 927; *Rogers v. Evarts*, 17 N. Y. Supp. 264; *O'Neil v. Behanna*, 182 Pa. St. 236.

Upon the trial of the present case the contest appears to have been upon questions of fact rather than of law; upon the question of whether violence, threats and intimidation were the means used and directed by the defendants to be used, rather than whether proof of those facts was necessary in order to convict. The evidence is not before us, but the record shows that witnesses testified that pickets were instructed in open meetings by several of the defendants to use violence to prevent workmen from continuing in the employ of the team owners and liverymen, and that such instructions were obeyed.

The court instructed the jury that the information charged a criminal conspiracy, and properly defined that offense in the language of the opinion in *State v. Gannon*, 75 Conn. 206; that the right of the defendants and others to strike or leave the service of their employer singly or in a body, even though they believed that the result of such action would be to bring the business of their employer's temporarily to an end, and the right to meet together and counsel such action, were unquestionable; that if the only purpose of the strike was to procure better pay or shorter hours, the purpose was a lawful one, but that the defendants had no right to combine to accomplish such purpose by means of a crime; that if the real purpose of the strike was to ruin the employers' business by threats and intimidation, it was unlawful, and that a conspiracy for that purpose was a crime; that the stationing of pickets for the purpose of obtaining information as to the extent of the business of the person whom the picket was directed to watch, was not unlawful; that

it might be lawful to attempt to induce another to leave his employer's service by fair arguments, and, also, perhaps, to station pickets to ascertain how such persons might be reached and lawful means employed to induce them to leave their employers' service; that it was the right of members of these unions and other drivers to refuse to drive their carriages at any time, and was lawful for the defendants to solicit the business which was being done by said team owners and liverymen, and to induce their customers by fair means to employ the defendants and their friends; but that a combination to do these things by threats and intimidation was a criminal combination, and that the placing of pickets to induce one to leave his employer's service by threats and intimidation was unlawful; but that the defendants should not be convicted for what some one else had done, but only for what they had themselves done; that the words "threat" and "intimidation" had their ordinary meaning in the statute, and that for the purposes of this case a threat was a menace of such nature as to unsettle the mind of the person upon whom it operated.

Upon an examination of the entire charge we are satisfied that the defendants have no just cause of complaint, either upon the ground that the court failed to instruct the jury sufficiently fully upon the subjects embraced in their requests, or to fairly and properly present the case to the jury.

* * * * *

Other rulings complained of in the reasons of appeal require no discussion.

There is no error.

In this opinion the other judges concurred.

CHAPTER VI.

THE MENTAL ELEMENT OF CRIME.

Section 1.—Criminal Intent in General.

"It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offense some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of that kind which is designated by the expression *mens rea*."

Cave J., in *Chisholm v. Doulton*, 22 Q. B. D. 736.

REGINA v. DOWNES.

1875. COURT OF CRIMINAL APPEALS. 13 Cox Cr. C. 111.

Case reserved for the opinion of this court by BLACKBURN, J.¹

1. The prisoner was indicted at the Central Criminal Court for the manslaughter of Charles Downes.

2. It appeared on the trial before me by the evidence that Charles Downes was an infant who, at the time of his death, was a little more than two years old. The child had been ill, and wasting away for eight or nine months, before his death. The prisoner, who resided at Woolwich, was the father of the deceased, and had during the whole of this time the custody of the child.

3. The prisoner was one of a sect who call themselves "The Peculiar People."

4. During the whole period of the child's illness he did not procure any skilled advice as to the treatment of the child, but left it to the charge of women who belonged to his sect, and called in at intervals George Hurry, an engine driver, who prayed over the child, and anointed it with oil.

5. The reason of this course of conduct was explained by George Hurry, who was called as a witness.

¹ Part of the statement of facts is omitted.

6. He stated that "The Peculiar People" never call in medical advice or give medicine in case of sickness. They had religious objections to doing so. They called in the elders of the church, who prayed over the sick person, anointing him with oil in the name of the Lord. This he said they did in literal compliance with the directions in the 14th and 15th verses of the fifth chapter of the Epistle of St. James, and in hope that the cure would follow.

7. This course was pursued with regard to the deceased infant during its illness. The prisoner consulted the witness Hurry as to what was the matter with the child, and as to what should be given to it. They thought it was suffering from teething; and he advised the parents to give it port wine, eggs, arrowroot, and other articles of diet which he thought suitable for a child suffering from such a complaint, all of which were supplied accordingly. There was no evidence that this treatment was mischievous, and though this was probably not logically consistent with the doctrines of his sect as described by him, I saw no reason to doubt that it was all done in perfect sincerity.

* * * * *

10. It was admitted on the part of the prosecution that the child was kindly treated, kept clean, and furnished with sufficient food, and nursed kindly by the mother and the women of the sect.

11. Evidence was then given that the prisoner had sufficient means to procure skilled advice, which was easily to be obtained at Woolwich. That neither he nor the elder had any competent skill. The disease of which the child died having nothing whatever to do with teething, but being chronic inflammation of the lungs and pleura, which was of long standing, and was a disease which might have been cured at any time if competent advice had been obtained, probably though not certainly, would have been so cured, if the advice had been called in in the early stages of the complaint.

12. The prisoner in his own defence said that he sincerely believed that by abstaining from calling in medical aid he gave the child the best chance of recovery, as, if he showed a want of faith, he thought he could not rely on the promise which he thought was given.

13. The prisoner had no counsel.

* * * * *

15. I told the jury that the law casts on the father who has the custody of a helpless infant a duty to provide according to his ability all that is reasonably necessary for the child, including, if the child is so ill as to require it, the advice of persons reasonably believed to have competent medical skill, and that if death ensues from the neglect of this duty it is manslaughter in the father neglecting the duty.

I told them that I did not as at present advised think it any de-

fence that the prisoner sincerely believed that he ought not to provide such advice, nor that he believed that he was doing the best for the child if he had not, in fact, competent skill and knowledge himself. After explaining this more fully I asked the jury four questions which, to prevent any risk of mistakes, I reduced to writing and handed to them. They answered all in the affirmative.

16. The following is a copy of the writing I handed to the jury and their answers:

Did the prisoner neglect to procure medical aid for the helpless infant when it was in fact reasonable so to do, and he had the ability?—Yes.

Was the death caused by that neglect?—Yes.

Unless both of these are proved he is not guilty. If both proved find him guilty, but then say further,

Did the prisoner bona fide though erroneously believe that medical advice was not required for the child?—Yes.

Or bona fide believe that it was wrong to call in medical aid?—Yes.

I thereupon directed the verdict of guilty to be entered, and admitted the prisoner to bail.

The question for the opinion of this court is whether the conviction so obtained on this direction and those findings should stand or be set aside.

COLERIDGE, C. J.—I think that this conviction should be affirmed. For my own part, but for the statute, 31 & 32 Vic., ch. 122, § 37, I should have much doubt about this case, and should have desired it to be further argued and considered. Perhaps it is enough to say that the opinions of Willes, J., and Pigott, B., are deserving of grave consideration. The statute 31 & 32 Vic., ch. 122, § 37, however, is a strong argument in favor of the conviction. By that enactment it is made an offence punishable summarily if any parent wilfully neglects to provide (*inter alia*) medical aid for his child being in his custody under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured. That enactment I understand to mean that if any parent intentionally, i. e., with the knowledge that medical aid is to be obtained, and with a deliberate intention abstains from providing it, he is guilty of an offence. Under that enactment upon these facts the prisoner would clearly have been guilty of the offence created by it. If the death of a person results from the culpable omission of a breach of duty created by the law, the death so caused is the subject of manslaughter. In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law—whether proceeding from a good or bad motive is not material. The necessary ingredient to constitute the crime of manslaughter existed, therefore, in this case, and for that reason this conviction ought to be affirmed.

BRAMWELL, B.—I am of the same opinion. The 31 and 32 Vict., ch. 122, § 37, has imposed a positive and absolute duty on parents, whatever their conscientious or superstitious opinions may be, to provide medical aid for their infant children in their custody. The facts show that the prisoner thought it was irreligious to call in medical aid, but that is no excuse for not obeying the law.

MELLOR, J.—I am of the same opinion. The 31 & 32 Vict., ch. 122, § 37, does not seem to have been called to the attention of Pigott, B., in *Reg. v. Hines*, or my brother Blackburn upon the trial of the present case. Otherwise it may be that Pigott, B., would have summed up differently to the jury.

Grove, J., and Pollock, B., concurred.

Conviction affirmed.²

STATE v. WHITE.

1886. SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.
64 N. H. 48, 5 Atl. 828.

Complaints, upon Gen. Laws, ch. 269, § 5, for beating a drum within the compact part of the town of Somersworth, not by command of a military officer having authority therefor. The respondents admitted doing the acts charged and offered to prove that they were done in accordance with their sense of religious duty, and in worshipping God according to the dictates of their own consciences, and that they were not disturbing the public peace or the religious worship of others. The court ruled that the evidence offered did not constitute a defence, and the respondents excepted.

CLARK, J.³—The statute upon which the complaints are founded is as follows: "No person shall, within the compact part of any town, fire or discharge any cannon, gun, pistol, or other fire-arms, or beat any drum, except by command of a military officer having authority therefor, or fire or discharge any rockets, squibs, crackers, or any preparation of gunpowder, except by permission of a majority of the police officers or selectmen in writing, or make any bonfire, or improperly use or expose any friction matches, or knowingly raise or repeat any false cry of fire." G. L., ch. 269, § 5. This statute, like §§ 7, 10, and 14 of the same chapter, against obstructing streets and sidewalks, and prohibiting fast driving in any street within the compact part of a town, is designed for the security of the public convenience, safety, and tranquillity. As it would be no defence

² Accord: *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187, 98 Am. St. 666; *Reg. v. Senior*, 19 Cox Cr. C. 219.

³ Part of the opinion discussing a constitutional question is omitted.

to a complaint for a violation of the statute against incumbering streets, or for fast driving, to show that there was nobody else in the street at the time, and therefore no actual danger of obstruction or collision, so it would be no defence to show that no actual disturbance of the peace or of the religious worship of others resulted from the violation of the statute by the respondents. The act complained of being expressly prohibited by the statute for the prevention of disturbance of the public peace and tranquillity, an actual disturbance is not necessary to complete the offence. *State v. Cate*, 58 N. H. 240. To constitute the offence charged, no other intent or consequence is required than the intentional doing of the act which the statute forbids. 1 Bish. Cr. Law 428. Nor is it a legal justification that the act was done in the performance of religious services in accordance with the religious belief of the respondents. To recognize such a defence would be to make the professed religious belief and practices of the respondents superior to the statute. *Reynolds v. United States*, 98 U. S. 145.

* * * * *

Exceptions overruled.

Bingham, J., did not sit; the others concurred.^{3a}

PEOPLE v. MOLINEUX.

1901. COURT OF APPEALS NEW YORK. 167 N. Y. 264,
61 N. E. 286, 62 L. R. A. 193.

From opinion of WERNER, J.

In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property and obtaining money under false pretense.

^{3a} In *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244, it was held that a religious belief in plural marriage was no defense to a prosecution for polygamy.

An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore, intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. (*Commonwealth v. Jackson*, 132 Mass. 16; *Commonwealth v. Bigelow*, 8 Metc. 235; *Commonwealth v. Stone*, 4 Metc. 43; *Helm's Case*, 1 City Hall Rec. 49; *Coffey's Cases*, 4 City Hall Rec. 52; *Dougherty's Case*, 4 City Hall Rec. 166.) So in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense and scienter may be proved by other previous similar acts. (*Commonwealth v. Johnson*, 133 Pa. St. 293; *Coleman v. People*, 58 N. Y. 555; *Copperman v. People*, 56 N. Y. 591; *People v. McClure*, 148 N. Y. 95.) In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time that the instrument described in the indictment was forged or uttered the defendant had passed, or had in his possession, similar forged instruments, as it tends to prove intent. (*Commonwealth v. Russell*, 156 Mass. 196; *People v. Everhardt*, 104 N. Y. 591; *Reg. v. Colclough*, 15 Cox Crim. Cas. 92.) On the trial of an indictment for obtaining goods by false representation, similar representations made by the defendant to creditors from whom goods had been previously purchased by him were held admissible to prove intent. (*Mayer v. People*, 80 N. Y. 364.) It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act.

REGINA v. PRINCE.

1875. COURT OF CRIMINAL APPEALS. 13 Cox Cr. C. 138.

Case reserved for the opinion of the Court for the Consideration of Crown Cases Reserved by Denman, J.

At the Assizes for Surrey, held at Kingston-on-Thames on the 24th March last, Henry Prince was tried before me upon the charge of having unlawfully taken one Annie Phillips, an unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father. The indictment was framed under § 55 of 24 & 25 Vict., ch. 100.

He was found guilty, but judgment was respited in order that the opinion of the Court for Crown Cases Reserved might be taken upon the following case.

All the facts necessary to support a conviction existed, and were found by the jury to have existed, unless the following facts constitute a defence. The girl, Annie Phillips, though proved by her father to be fourteen years old on the 6th April following, looked very much older than sixteen; and the jury found upon reasonable evidence, that before the defendant took her away she had told him that she was eighteen, and that the defendant bona fide believed that statement and that such belief was reasonable.

If the court is of opinion that under these circumstances a conviction was right, the defendant is to appear for judgment at the next Assizes for Surrey, otherwise the conviction is to be quashed. (See *R. v. Robins*, 1 C. & K. 456; *R. v. Olifier*, 10 Cox C. C. 402.)

No counsel was instructed to argue on behalf of the prisoner.

The case came on in the court below on 24th April, and was directed to be argued before all the judges.

BRAMWELL, B., delivered the following judgment, to which the Lord Chief Baron Kelly, Cleasby, B., Grove, J., Pollock, B., and Amphlett, B., assented.⁴ The question in the case depends on the construction of the statute under which the prisoner is indicted. That enacts that "whosoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession, and against the will of her father, or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause"—such as would exist for instance on a taking by a police officer on a charge of felony, or a taking by a father of his child from her school. The statute, therefore, may be read thus: "whosoever shall take, &c., without lawful cause." Now the prisoner had no such cause, and consequently except in so far as it helps the construction of the statute, the word "unlawfully" may, in the present case, be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen out of the possession of, and against the will of her father? In fact he has; but it is said not within the meaning of the statute, and that that must be read as though the word "knowingly" or some equivalent word was in, and the reason given is, that as a rule the mens rea is necessary to make any act a crime or offence, and that if the facts necessary to constitute an offence are not known to the alleged offender, there can be no mens rea. I have used the word "knowingly," but it will perhaps be said, that here the prisoner not only did not do the act knowingly, but knew, as he would have said or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and

⁴ Argument of counsel, part of the opinion of Blackburn, J., the dissenting opinion of Brett, J., and the concurring opinion of Denman, J., are omitted.

will take the chance," but acted on the reasonable belief that she was over sixteen; and that though, if he had done what he did, knowing or believing neither way, but hazarding it, there would be a *mens rea*, there is not one when he believes he knows that she is over sixteen. It is impossible to suppose that a person taking a girl out of her father's possession against his will is guilty of no offense within the statute unless he, the taker, knows she is under sixteen—that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," &c. Those words are not there, and the question is whether we are bound to construe the statute as though they were, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause. I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female, with a good motive. Nevertheless, though there may be cases which are not immoral in one sense, I say that the act forbidden is wrong. Let us remember what is the case supposed by the statute. It supposes that there is a girl,—it does not say a woman, but a girl, something, between a child and a woman—it supposes she is in the possession of her father, or mother, or other person having lawful care and charge of her, and it supposes there is a taking, and that that taking is against the will of the person in whose possession she is. It is then a taking of a girl in the possession of someone, against his will. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's or even father's house is wrong. She is at an age when she has a right to choose for herself; she is not a girl, nor of such tender age that she can be said to be in the possession of or under the care or charge of anyone. If I am asked where I draw the line, I answer at when the female is no longer a girl in anyone's possession. But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, and can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if anyone does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine

of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*. So if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute, an act which, if he knew she was in the possession and care or charge of anyone, he would know was a crime or not according as she was under sixteen or not. He would know he was doing an act wrong itself, whatever was his intention, if done without lawful cause. In addition to these considerations one may add, that the statute does use the word "unlawfully," and does not use the words "knowingly or not believing to the contrary." If the question was whether his act was unlawful there would be no difficulty, as it clearly was not lawful. This view of the section to my mind is much strengthened by a reference to other sections of the same statute. Sect. 50 makes it a felony to unlawfully and carnally know a girl under the age of ten. Sect. 51 enacts (when she is above ten and under twelve) to unlawfully and carnally know her is a misdemeanor. Can it be supposed, in the former case, a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanor, or that he believed her over twelve, and so had committed no offence at all; or that in a case under § 51, he could claim to be acquitted, because he believed her over twelve? In both cases the act is intrinsically wrong. For the statute says if "unlawfully" done. The act done with a *mens rea* is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So, § 56 by which whoever shall take away any child under fourteen, with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say, "I did take away the child to steal its clothes, but I believed it to be over fourteen?" If not, then neither could he say "I did take the child with intent to deprive the parent of its possession, but I believed it over fourteen." Because if words to that effect can not be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if these words can not be introduced in § 56 why can they be in § 55? The same principle applies in these cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer (*Reg. v. Forbes*, 10 Cox C. C. 362). Why? Because the act was wrong in itself. So also in the case of burglary; could a person charged claim an acquittal on the ground that he believed it was past 6 a. m. when he entered, or in housebreaking that he did not know the place broken into was a house. As to the case of the marine stores it was held properly that there was no

mens rea where the persons charged with the possession of naval stores with the admiralty mark did not know the stores he had bore the mark (Reg. v. Sleep, 8 Cox C. C. 472; 30 L. J. 171, M. C.); because there is nothing *prima facie* wrong or immoral in having naval stores unless they are so marked. But suppose some one had told him there was a mark, and he had said he would chance whether or no it was the admiralty mark. So in the case of the carrier with game in his possession, unless he knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitrol sender, there was nothing wrong in sending such packages as were sent unless they contained vitrol. Take also the case of libel where the publisher thought the occasion privileged, or that he had a defense under Lord Campbell's Act but was wrong. He would not be entitled to be acquitted, because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause. Further there have been four decisions on this statute in favor of the construction I contend for. I say it is a question of construction of this particular statute, no doubt bringing thereto the common law doctrine of *mens rea* being a necessary ingredient of crime. It seems to me impossible to say that, where a person takes a girl out of her father's possession not knowing whether she is or is not under sixteen, that he is not guilty, and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety. I think the conviction should be affirmed.

BLACKBURN, J., delivered the following judgment, to which Cockburn, C. J., Mellor, Lush, Quain, Archibald, Field, and Lindley, JJ., assented—In this case we must take it as found by the jury that the prisoner took an unmarried girl out of the possession, and against the will of her father, and that the girl was in fact under the age of sixteen, but that the prisoner bona fide, and on reasonable grounds, believed that she was above sixteen, viz., eighteen years old. No question arises as to what constitutes a taking out of the possession of her father; nor as to what circumstances might justify such taking as not being unlawful; nor as to how far an honest though mistaken belief that such circumstances as would justify the taking existed, might form an excuse; for as the case is reserved we must take it as proved that the prisoner knew that the girl was in the possession of her father, and that he took her knowing that he trespassed on the father's rights, and had no colour of excuse for so doing. The question, therefore, is reduced to this, whether the words in 24 & 25 Vict., ch. 100, § 55, that whosoever shall unlawfully take "any unmarried girl being under the age of sixteen, out of the possession of her father" are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are contained in the statute, nor is the word "mali-

ciously," "knowingly," or any other word used that can be said to involve a similar meaning. The argument in favor of the prisoner must, therefore, entirely proceed on the ground that in general a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime the intention of the legislature should be presumed to be to include "knowingly" in the definition of the crime; and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not inquire at present whether the canon of construction goes quite so far as above stated, for we are of opinion that the intention of the legislature sufficiently appears to have been to punish the abductor, unless the girl, in fact, was of such an age as to make her consent an excuse irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen. * * *

Conviction affirmed.⁵

FAIN v. COMMONWEALTH.

1879. COURT OF APPEALS OF KENTUCKY. 78 Ky. 183,
39 Am. Rep. 213.

JUDGE COFER delivered the opinion of the court.⁶

The appellant was indicted and tried for the murder of Henry Smith, a porter at the Veranda Hotel at Nicholasville. He was

⁵ Accord: *State v. Ruhl*, 8 Iowa 449. The mental element of crime is frequently denoted by the words "knowingly," "wilfully," "maliciously," or "feloniously." They are defined by Neil, J., in *State v. Smith*, 119 Tenn. 521, 105 S. W. 68, as follows: "The word 'knowingly' has been construed by this court as being that state of mind wherein the person charged was in possession of facts under which he was aware he could not lawfully do the act whereof he was charged; knowledge of the law being necessarily imputed to him, as in all criminal cases. This was held in a case wherein the party was indicted for illegal voting under a statute which provided that 'any person who shall knowingly vote at any election, not being at the time a qualified voter in the county in which he so votes, shall be adjudged guilty of a misdemeanor,' etc. *McGuire v. State*, 7 Humph. 54. 'Wilfully' means intentionally; that is, that the person doing the act intended at the time to perform that act. The word 'maliciously,' in the connection in which it appears, is used in the broad, legal sense of criminal intention, or that state of mind of a person who does a wrongful act intentionally or wilfully, and without legal justification or excuse. The three terms taken together contemplate a case wherein a man acts advisedly, intentionally, and with criminal intent, in the sense in which the latter expression has just been explained. The word 'feloniously' fully covers the meaning of the word 'maliciously' just indicated.

"'Feloniously' is defined in the Century dictionary as follows: 'With deliberate intent to commit a wrongful act, the act being in law such as constitutes a crime of the class termed felonies.' In Webster's International dictionary one meaning attached to the word is: 'In a legal sense, done with the intent to commit a crime.'"

⁶ Part of the opinion is omitted.

found guilty of manslaughter, and sentenced to confinement in the penitentiary for two years. From that judgment he prosecutes this appeal.

The prisoner and his friend George Welch went to the Veranda Hotel after dark on an evening in February. The weather was cold, and there was snow upon the ground. They sat down in the public room and went to sleep. In a short time Welch awoke, and, finding the deceased in the barber shop, in the next room, called for a bed for himself and the prisoner, to pay for which he handed the deceased a bill. Welch attempted to awaken the prisoner by shaking him, but failed. He then told the deceased to wake him up. The deceased shook him for some time, and failing to wake him, said he believed he was dead. Welch said no, he is not; wake him up. The deceased shook him harder and harder until the prisoner looked up and asked what he wanted. The deceased said he wanted him to go to bed. The prisoner said he would not, and told the deceased to go away and let him alone. The deceased said it was getting late, and he wanted to close the house, and still holding the prisoner by the coat, the latter either raised or was lifted up, and, as he arose, he threw his hand to his side as if to draw a weapon. A bystander said to him, "Don't shoot"; but without noticing or giving any sign that he heard what was said, he drew a pistol and fired. The deceased instantly grappled him to prevent him from shooting again, but a second shot was fired almost immediately, and a third soon followed. After the third shot was fired the prisoner was thrown down and held by the deceased. The prisoner, while being held on the floor, hallowed *hoo-wee* very loud two or three times, and called for Welch. He asked the deceased to let him get up; but the deceased said, "If I do, you will shoot me again." The prisoner said he would not, and the deceased released his hold and allowed him to get up. Upon getting up the prisoner went out of the room with his pistol in his hand. His manner was that of a frightened man. He said to a witness, "Take my pistol and defend me;" said he had shot someone, but did not know who it was, and upon being told who it was, expressed sorrow for what he had done.

It did not appear that the prisoner knew or had ever seen the deceased before. There was not the slightest evidence of a motive on his part to injure the deceased, nor does there appear to have been anything in what the deceased did or the manner of doing it which, the facts being understood, was calculated to excite anger, much less a desire to kill him. At that time the prisoner was about thirty-three years of age, and he introduced evidence to show that he had been a man of good character and of peaceable and orderly habits.

He also offered to prove that he had been a sleep-walker from his infancy; that he had to be watched to prevent injury to himself; that he was put to sleep in a lower room, near that of his parents,

and a servant-man was required to sleep in the room to watch him; that frequently, when aroused from sleep, he seemed frightened, and attempted violence as if resisting an assault, and for some minutes seemed unconscious of what he did or what went on around him; that sometimes, when partly asleep, he resisted the servant who slept in the room with him, as if he supposed the servant was assaulting him. * * *

The court rejected all this proffered evidence, and the prisoner excepted. * * *

It is one of the fundamental principles of the criminal law that there can be no criminality in the absence of criminal intention; and when we ascertain from medical experts or otherwise that there is such a thing in nature as somnolentia and somnambulism, the task of the jurist is ended, so far as relates to the right of one accused of crime to offer evidence conducing to prove that he committed the act imputed to him as a crime while in a paroxysm of somnolentia or somnambulism. In criminal trials, the jury must try every pertinent question of fact the evidence conduces to prove. When evidence is offered, the sole question for the court is, will it conduce to prove any fact material in the case? and if the law gives an affirmative response, the evidence must be admitted. If, as claimed, the appellant was unconscious when he fired the first shot, it can not be imputed to him as a crime. Nor is he guilty if partially conscious, if, upon being partially awakened, and finding the deceased had hold of him and was shaking him, he imagined he was being attacked, and he believed himself in danger of losing his life or sustaining great bodily injury at the hands of his assailant, he shot in good faith, believing it necessary to preserve his life or his person from great harm. In such circumstances, it does not matter whether he had reasonable grounds for his belief or not. He had been asleep, and could know nothing of the surrounding circumstances. In his condition he may have supposed he was assailed for a deadly purpose, and if he did, he is not to be punished because his half-awakened consciousness deceived him as to the real facts, any more than if, being awake, the deceased had presented a pistol to his head with the apparent intention to shoot him, when in fact he was only jesting, or if the supposed pistol, though sufficiently resembling a deadly weapon to be readily mistaken for one, was but an inoffensive toy. * * *

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

STATE *v.* TORPHY.

1899. KANSAS CITY COURT OF APPEALS. 78 Mo. App. 206.

Appeal from the Jasper Circuit Court—Hon. E. C. Crow, Judge. Defendant discharged.⁷

GILL, J.—Defendant has appealed from a judgment of the lower court adjudging him guilty of the statutory crime of gambling. The case was submitted to the trial judge on an agreed statement of facts, the substance of which was, that while defendant was a member of the city council of Carthage and as such one of the committee on police, he undertook, under the instruction and direction of the mayor, to ferret out and secure evidence against certain parties suspected of violating the law relating to gambling. With this in view, and for this purpose only, the defendant visited the suspected room in Carthage; and there finding certain parties, he entered with them into a game of poker, betting a small sum of money on the result. The agreed case concedes that defendant's sole object and purpose in engaging in the game was to disarm suspicion and enable him to secure evidence to convict these habitual violators of the law.

1. On the facts above stated, it seems to me that defendant ought not to have been convicted; there was clearly no criminal intent. The general proposition is, that without a criminal intent there ought not to be criminal punishment. In the late work of McClain on Criminal Law, § 117, the learned author says:

"Another illustration of the doctrine that the intent determines criminality is found in the rule that a detective who joins with persons in the commission of a crime for the purpose of securing their arrest and conviction is not punishable, although he so far cooperates as to be guilty if his intention had been the same as theirs. Thus a detective who has cooperated with a criminal in committing an offense it not to be deemed an accomplice whose evidence must be corroborated." The cases cited in notes by the author fully sustain the text. See *Campbell v. Commonwealth*, 84 Pa. St. 187; *Commonwealth v. Hollister*, 157 Pa. St. 13; *People v. Noelke*, 94 N. Y. 137; *People v. Farrell*, 30 Cal. 316; *Price v. People*, 109 Ill. 109; *State v. McKean*, 36 Iowa 343; 2 *Taylor on Ev.*, § 971; 1 *Greenl. Ev.*, § 382.

In view of the rule above stated and as announced in the foregoing authorities, the defendant ought not to be held. The other judges concurring the judgment will be reversed and defendant discharged.

ELLISON, J. (dissenting).—A detective, or a decoy, may seemingly take part with others in the commission of a crime or misdemeanor, for the purpose of bringing such others to justice. I think that is all the cases cited by Judge Gill will be found to sustain. But the detective can not actually commit the crime himself and

⁷ Argument of counsel is omitted.

escape punishment, on the ground that his object was to apprehend others. It was decided in Pennsylvania that a detective did not become the accomplice of those who murdered a man by reason of joining the conspiracy and urging the crime, his intention being to have them apprehended before the murder, though in this he failed. *Campbell v. Commonwealth*, 84 Pa. St. 187.

He may become a member of a band of murderers for the purpose of exposing them to justice, but he, himself, could not be excused for killing the man selected for assassination. For there he would do the act which makes up the whole crime. There are many instances where detectives, for the purpose of apprehending burglars or other thieves, join them in their perpetration of this offense, and such detectives, seemingly, do commit the offense, but in reality they do not convert the goods to their own use, and have no intention of doing so, and therefore the main ingredient of the crime does not attach to them. But if they joined such criminals, and though acting as detectives, they not only seemingly but did actually convert and secrete the property, they would be thieves of course, and would be punished as such.

So it has been decided that one may purchase liquor of another engaged in its illegal sale and he is not an accomplice; and this, whether he is acting as a detective or otherwise. But it would not be contended that for the purpose of discovering the illegal vendor of the liquor, a detective could engage as his clerk, or partner, and himself make the illegal sale and not be held guilty. In some jurisdictions it is a misdemeanor and in some, a felony, to commit adultery. It would scarcely be pretended that one could escape punishment when he actually committed the act, on the plea that he did it for the purpose of discovering the adulteress. The reason for all this is, that the detective has purposely committed all of the act which makes up the thing forbidden by law.

So in the case before us, the misdemeanor prohibited by law was playing at cards for money. Defendant did this: He did the thing prohibited by the statute, and he did it purposely, that is, intentionally. It will not do to say that he had no intention to gamble, for he did gamble, but said he did so with the view of detecting others. That was merely his motive, as distinguished from his intention. His intention was to do the act prohibited and his motive was to catch others. But one's motive, however sincere, will not excuse his violation of the penal statute. "That ultimate good was the transgressor's leading motive, while yet he intended to do what the law forbade, or that in fact good attended or followed the doing, will not avail him." 1 Bish. Crim. Law, § 341. The motive to murder might be to rid the community of a bad man; or to theft or forgery, to obtain money for the payment of debts or to relieve necessities, yet these do not excuse. 1 Wharton's Crim. Law, § 119. In my opinion the defendant was properly convicted.

Section 2.—Constructive Intent, and Specific Intent.

"And if a man happen to kill another, in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently can not but be attended with the danger of personal hurt to someone or other; as by committing a riot, robbing a park, etc., he shall be adjudged guilty of murder.

And a fortiori, he shall come under the same construction, who in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl, with an intent to steal them, etc., for such persons are by no means favored, and they must at their peril take care of the consequence of their actions; and it is a general rule, that wherever a man intending to commit one felony happens to commit another, he is as much guilty as if he had intended the felony which he actually commits." Hawkins P. C. ch. 29, §§ 10 and 11.

STATE v. RUHL.

1859. SUPREME COURT OF IOWA. 8 Iowa 449.

This was an indictment for taking and enticing away an unmarried female, under the age of fifteen years, from and without the consent of the person having the legal charge of her person, for the purpose of prostitution. On the trial, the defendant offered certain testimony, which was objected to and rejected. He also asked certain instructions, which were refused, and objected to those asked and given at the request of the state. There was a verdict of guilty; motions in arrest, and for a new trial, overruled; and defendant sentenced to the penitentiary for three years. The other necessary facts are stated in the opinion of the court.

WRIGHT, C. J.⁸—Several errors are assigned, and they will be briefly noticed in their order.

From the first bill of exceptions, it seems that during the examination of the defendant's witnesses, he proposed to recall the prosecuting witness (or Matilda M. Clark, the female alleged to have been enticed away) in order, first, to prepare a bill of exceptions; second, for the purpose of impeaching her; and, third, to settle the question as to what she did testify to, when previously upon the stand.

The defendant could not claim the privilege, as a matter of right, to recall the witness for either of these purposes. It is only show-

⁸ Part of the opinion is omitted.

that the court refused to have the witness recalled, and we are bound to presume that the discretion lodged with than tribunal over such matters of practice was properly exercised.

The second bill of exceptions shows, that the defendant proposed to prove that the said Matilda had, before the alleged enticing, told him that she was over fifteen years of age, which was objected to, and the objection sustained.

The language of the section (2584) under which this indictment was found is, that "if any person take or entice away an unmarried female, under the age of fifteen years, from her father or mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, he shall upon conviction, etc." The object of the proposed testimony, was to show that defendant believed, or had good reason to believe, that the prosecuting witness was, at the time of taking or enticing away, over fifteen years of age. Would such proof aid the defendant, if in fact the female was under the age named? We think not. It is not like the case stated by the appellant, and found in the books, of a married man, through a mistake of the person, having intercourse with a woman whom he supposed to be his wife, when she was not. In such a case there is no offense, for none was intended, either in law or morals. In the case at bar, however, if defendant enticed the female away, for the purpose of defilement or prostitution, there existed a criminal or wrongful intent—even though she was over fifteen. The testimony offered, was, therefore, irrelevant—for the only effect of it would have been to show that he intended one wrong and by mistake committed another. The wrongful intent to do the one act is only transposed to the other. And though the wrong intended was even not indictable, the defendant would still be liable, if the wrong done is so. Bish. Cr. Law, §§ 247, 249, 252, 254 (note 4). In this last section, the rule is thus briefly stated: "The wrong intended, but not done, and the wrong done, but not intended, coalesce, and together constitute the same offense, not always in the same degree, as if the prisoner had intended the thing unintentionally done." * * *

REGINA v. FRANKLIN

1883. SUSSEX ASSIZES. 15 Cox C. C. 163.

Charles Harris Franklin was indicted, before Field, J., at Lewes, for the manslaughter of Craven Patrick Trenchard.

The facts were as follows:

On the morning of the 25th day of July, 1882, the deceased was bathing in the sea from the West Pier, at Brighton, and swimming

in the deep water around it. The prisoner took up a good sized box from the refreshment stall on the pier and wantonly threw it into the sea. Unfortunately the box struck the deceased, C. P. Trenchard, who was at that moment swimming underneath, and so caused his death.

Gore, for the prosecution, urged that it would, apart from the question of negligence, be sufficient to constitute the offence of manslaughter, that the act done by the prisoner was an unlawful act, which the facts clearly showed it to be, and cited the case of *Rex v. Fenton* (1 Lewin's Cr. Cas. 179). This case is referred to in 1 Russell on Crimes 638: "If death ensues in consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is manslaughter. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding, and that in consequence of the scaffolding being so broken a corf in which the deceased was ascending the mine struck against a beam on which the scaffolding had been supported, and by such striking the corf was overturned and the deceased precipitated into the mine and killed. Tindal, C. J., said: "If death ensues as the consequence of a wrongful act, which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill or do any serious injury in the particular case or any general malice, the offence becomes that of murder. In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question, therefore, is whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act. If it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."

FIELD, J.—This is a question of great importance, for if I must follow the rulings of the very learned judge in *Reg. v. Fenton* (*ubi sup.*) it will be unnecessary to go into the question whether the prisoner was guilty of negligence. I will consult my brother Mathew upon the point.

Field, J., after a short interval, returned into court and said: I am of opinion that the case must go to the jury upon the broad ground of negligence and not upon the narrow ground proposed by the learned counsel, because it seems to me—and I may say that in this view my brother Mathew agrees—that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case. I have a great abhorrence of constructive crime. We do not think the case cited by the counsel for the prosecution is binding upon us in the facts of this case, and, therefore, the civil wrong against the

refreshment-stall keeper is immaterial to this charge of manslaughter. I do not think that the facts of this case bring it clearly within the principle laid down by Tindal, C. J., in *Reg. v. Fenton*. If I thought this case was in principle like that case I would, if requested, state a case for the opinion of the Court of Criminal Appeals. But I do not think so.

It was not disputed that the prisoner threw the box over the pier, that the box fell upon the boy, and the death of the boy was caused by the box falling upon him.

Gill, for the prisoner, relied upon the point that there was not proved such negligence as was criminal negligence on the part of the prisoner.

Field, J., in summing up the case to the jury, went carefully through the evidence, pointing out how the facts as admitted and proved affected the prisoner upon the legal question as he had explained to them.

The jury returned a verdict of guilty of manslaughter.

Guilty.

The prisoner was sentenced to two months' imprisonment.

COMMONWEALTH v. ADAMS.

1873. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
114 Mass. 323, 19 Am. Rep. 362.

Complaint for assault and battery.

At the trial in the superior court, before Bacon, J., it appeared that the defendant was driving in a sleigh down Beacon street, and was approaching the intersection of Charles street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing, he ran against and knocked down a boy who was crossing Beacon street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

ENDICOTT, J.—We are of opinion that the ruling in this case can not be sustained. It is true that one in the pursuit of an unlawful

act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction; that if the act the party was doing was merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se*, it is otherwise.⁹ 1 Hale P. C. 39. Foster C. L. 259. Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev., § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done wilfully or corruptly. The ordinance declares a certain thing to be illegal; it therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. *The King v. Sainsbury*, 4 T. R. 451, 457. It was held in *Commonwealth v. Worcester*, 3 Pick. 462, that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See *Commonwealth v. Farnen*. 9 Allen 489; *Commonwealth v. Waite*, 11 Allen 264. It is therefore immaterial whether a party violates the ordinance wilfully or not. The offence consists, not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a

New trial granted.

REGINA v. FAULKNER.

1877. CROWN CASE RESERVED. 13 Cox Cr. C. 550.

Case reserved by Lawson, J. At the Cork Summer Assizes, 1876, the prisoner was indicted for setting fire to the ship *Zemindar*, on

⁹ Some courts have held that the distinction between an act "*malum in se*" and "*malum prohibitum*" is unsound and obsolete; see *Sharp v. Farmer*, 4 Dev. & Battle (N. Car.) 123; *State v. Staunton*, 37 Conn. 421; but see *State v. Horton*, 139 N. Car. 588, 51 S. E. 945, 1 L. R. A. (N. S.) 991, 111 Am. St. 818.

the high seas, on the 26th day of June, 1876. The indictment was as follows: "That Robert Faulkner, on the 26th day of June, 1876, on board a certain ship called the Zemindar, the property of Sandback, Tenne & Co., on a certain voyage on the high seas, then being on the high seas, feloniously, unlawfully, and maliciously, did set fire to the said ship "with intent thereby to prejudice the said" (these words were struck out at the trial by the learned judge, and the following words inserted: "called the Zemindar, the property of,") Sandback, Tenne & Co., and that the said Robert Faulkner, on the day and year aforesaid, on board a certain ship called the Zemindar, being the property of Sandback, Parker, and others, on a certain voyage on the high seas, then being upon the high seas, feloniously, unlawfully, and maliciously, did set fire to the said ship, with intent thereby to prejudice the said Sandback, Parker, and others, the owners of certain goods and chattels then laden, and being on board said ship." It was proved that the Zemindar was on her voyage home with a cargo of rum, sugar and cotton, worth \$50,000. That the prisoner was a seaman on board, that he went into the fore-castle hold, opened the sliding door in the bulk head, and so got into the hold where the rum was stored; he had no business there, and no authority to go there, and went for the purpose of stealing some rum, that he bored a hole in the cask with a gimlet, that the rum ran out, that when trying to put a spile in the hole out of which the rum was running, he had a lighted match in his hand; that the rum caught fire; that the prisoner himself was burned on the arms and neck; and that the ship caught fire and was completely destroyed. At the close of the case for the Crown, counsel for the prisoner asked for a direction of an acquittal on the ground that on the facts proved the indictment was not sustained, nor the allegation that the prisoner had unlawfully and maliciously set fire to the ship proved. The Crown contended that inasmuch as the prisoner was at the time engaged in the commission of a felony, the indictment was sustained, and the allegation of the intent was immaterial.

At the second hearing of the case before the Court for Crown Cases Reserved, the learned judge made the addition of the following paragraph to the case stated by him for the court:

"It was conceded that the prisoner had no actual intention of burning the vessel, and I was not asked to leave any question to the jury as to the prisoner's knowing the probable consequences of his act, or as to his reckless conduct."

The learned judge told the jury that although the prisoner had no actual intention of burning the vessel, still if they found he was engaged in stealing the rum, and that the fire took place in the manner above stated, they ought to find him guilty. The jury found the prisoner guilty on both counts, and he was sentenced to seven years penal servitude. The question for the court was whether the direc-

tion of the learned judge was right; if not, the conviction should be quashed.

* * * * *

FITZGERALD, J.¹⁰—I concur in opinion with my brother Barry, and for the reasons he has given, that the direction of the learned judge can not be sustained in law, and that therefore the conviction should be quashed. I am further of opinion that in order to establish the charge of felony under § 42, the intention of the accused forms an element in the crime to the extent that it should appear that the defendant intended to do the very act with which he is charged, or that it was the necessary consequence of some other felonious or criminal act in which he was engaged, or that having a probable result which the defendant foresaw, or ought to have foreseen, he, nevertheless, persevered in such other felonious or criminal act. The prisoner did not intend to set fire to the ship—the fire was not the necessary result of the felony he was attempting; and if it was a probable result, which he ought to have foreseen, of the felonious transaction on which he was engaged, and from which a malicious design to commit the injurious act with which he is charged might have been fairly imputed to him, that view of the case was not submitted to the jury. On the contrary, it was excluded from their consideration on the requisition of the counsel for the prosecution. Counsel for the prosecution in effect insisted that the defendant, being engaged in the commission of, or in an attempt to commit a felony, was criminally responsible for every result that was occasioned thereby, even though it was not a probable consequence of his act or such as he could have reasonably foreseen or intended. No authority has been cited for a proposition so extensive, and I am of opinion that it is not warranted by law. Referring to the statute on which the prisoner is charged, it is to be observed that in several instances the sections creating substantive felonies are followed by others making an attempt to do the same thing also a felony. Now, it is obvious that an attempt to do a particular thing necessarily involves the intention to commit the act. If, in the case before us, the burning rum had been extinguished before the ship took fire, could it be contended that an indictment for a wilful and malicious attempt to set fire to the ship could have been maintained?

O'BRIEN, J.—I am also of opinion that the conviction should be quashed, and I was of that opinion before the case for our consideration was amended by my brother Lawson. I had inferred from the original case that his direction to the jury was to the effect now expressly stated by amendment, and that, at the trial, the Crown's counsel conceded that the prisoner had no intention of burning the vessel, or of igniting the rum; and raised no questions as to pris-

¹⁰ Arguments of counsel, opinions of Barry, J., Fitzgerald, B., Palles, C. B., and dissenting opinion of Keogh, J., are omitted.

oner's imagining or having any ground for supposing that the fire would be the result or consequence of his act in stealing the rum. With respect to *Reg. v. Pembliton* (12 Cox C. C. 607), it appears to me there were much stronger grounds in that case for upholding the conviction than exist in the case before us. In that case breaking of the window was the act of the prisoner. He threw the stone that broke it; he threw it with the unlawful intent of striking some one of the crowd about, and the breaking of the window, was the direct and immediate result of his act. And yet the court unanimously quashed the conviction upon the ground that, although the prisoner threw the stone intending to strike some one or more persons, he did not intend to break the window. The courts above have intimated their opinion that if the jury (upon a question to that effect being left to them) had found that the prisoner, knowing the window was there, might have reasonably expected that the result of his act would be the breaking of the window, that then the conviction should be upheld. During the argument of this case the crown counsel required us to assume that the jury found their verdict upon the ground that in their opinion the prisoner may have expected that the fire would be the consequence of his act in stealing the rum, but nevertheless did the act recklessly, not caring whether the fire took place or not. But at the trial there was not even a suggestion of any such ground, and we cannot assume that the jury formed an opinion which there was no evidence to sustain, and which would be altogether inconsistent with the circumstances under which the fire took place. The reasonable inference from the evidence is that the prisoner lighted the match for the purpose of putting the spile in the hole to stop the further running of the rum, and that while he was attempting to do so, the rum came in contact with the lighted match and took fire. The recent case of *Reg. v. Welch* (13 Cox C. C. 121) has been also referred to, and has been relied on by the Crown counsel on the ground that, though the jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare that had died from the injury inflicted by the prisoner, the prisoner was, nevertheless, convicted on an indictment charging him with having unlawfully and maliciously killed, maimed, or wounded the mare, and such conviction was upheld by the court. But on referring to the circumstances of that case it will be seen that the decision in it does not in any way conflict with that in the previous case of *Reg. v. Pembliton*, and furnishes no ground for sustaining the present conviction. Mr. Justice Lindley, who tried that subsequent case, appears to have acted in accordance with the opinion expressed by the judges in *Reg. v. Pembliton*. Besides leaving to the jury the question of prisoner's intent, he also left them a second question, namely, whether the prisoner, when he did the act complained of, knew that what he was doing would or might kill, maim,

or wound the mare, and nevertheless did the act recklessly, and not caring whether the mare was injured or not. The jury answered that second question in the affirmative. Their finding was clearly warranted by the evidence, and the conviction was properly affirmed. By those two questions a distinction was taken between the case of an act done by a party with the actual intent to cause the injury inflicted, and the case of an act done by a party knowing or believing that it would or might cause such injury, but reckless of the result whether it did or did not. In the case now before us there was no ground whatever for submitting to the jury any question as to the prisoner believing or supposing that the stealing of the rum would be attended with a result so accidental and so dangerous to himself. During the argument doubts were suggested as to the soundness of the decision in *Reg. v. Pembliton*; but in my opinion that case was rightly decided, and should be followed. Its authority was not questioned in *Reg. v. Welch*, in which the judges who constituted the Court were different from those who had decided *Reg. v. Pembliton*, with the exception of Lord Coleridge, who delivered the judgments of the court on both occasions.

Conviction quashed.

REGINA v. LATIMER.

1886. CROWN CASE RESERVED. 16 Cox Cr. C. 70.

Case stated by the learned Recorder for the borough of Devonport as follows:

The prisoner was tried at the April quarter sessions for the borough of Devonport on the 10th day of April, 1886.

The prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. There was a second count charging him with a common assault.

The evidence showed that the prosecutrix, Ellen Rolston, kept a public-house in Devonport; that on Sunday, the 14th day of February, 1886, the prisoner, who was a soldier, and a man named Horace Chapple were in the public-house, and a quarrel took place, and eventually the prisoner was knocked down by the man Horace Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting, having in his hand his belt, which he had taken off. As the prisoner passed he aimed a blow with his belt at the said Horace Chapple, and struck him slightly, the belt bounded off and struck the prosecutrix, who was standing talking to the said Horace Chapple, in the face, cutting her face open and wounding her severely.

At the close of the case the learned Recorder left these questions to the jury: 1. Was the blow struck at Chapple in self-defence to get through the room, or unlawfully and maliciously? 2. Did the blow so struck in fact wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: 1. That the blow was unlawful and malicious. 2. That the blow did in fact wound Ellen Rolston. 3. That the striking Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the learned Recorder directed a verdict of guilty to be entered to the first count, but respited judgment, and admitted the prisoner to bail, to come up for judgment at the next sessions.

The question for the consideration of the court was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted.

By § 20 of 24 & 25, Vict., c. 100, it is enacted that,

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of misdemeanor.¹¹

LORD COLERIDGE, C. J.—I am of opinion that this conviction must be sustained. In the first place, it is common knowledge that, if a person has a malicious intent toward one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice; and is guilty if the result of his unlawful act be to injure a particular person. That would be the law if the case were *res integra*; but it is not *res integra*, because, in *Reg. v. Hunt*, a man in attempting to injure A, stabbed the wrong man. There, in point of fact, he had no more intention of injuring B than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that, under such circumstances, a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for the case of *Reg. v. Pembliton*. But I observe that in such an indictment, as in that case, the words of the statute carry the case against the prisoner more clearly still, because, by § 18 of the statute 24 & 25, Vict., c. 100, it is enacted that: "Whosoever shall unlawfully and maliciously by any means whatsoever wound * * * any person * * * with intent * * * to maim, disfigure, or disable any person

¹¹ Argument of counsel is omitted.

* * * shall be guilty of felony"; and then § 20 enacts that "whoever shall unlawfully and maliciously wound * * * any other person * * * shall be guilty of a misdemeanor;" and be liable to certain punishments. Therefore, the language of the 18th and 20th sections are perfectly different; and it must be remembered that this is a conviction for an offence under the 20th section. Now, the Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute of 9 Geo. 4, c. 31, where it was necessary that the act should have been done with intent to maim, disfigure, or disable such person, showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, and the words are "wound any other person." I can not see that there could be any question, but for the case of *Reg. v. Pembliton*. Now, I think that that case was properly decided; but upon a ground which renders it clearly distinguishable from the present case. That is to say, the statute which was under discussion in *Reg. v. Pembliton* makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts expressly negatived that there was any intent to injure any property at all; and the court held that, in a statute which created it an offence to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case Mr. Croft is out of court, and I therefore think that this conviction should be sustained.

LORD ESHER, M. R.—I am of the same opinion. It seems to me that the case of *Reg. v. Pembliton* is the only case which could be cited against a well-known principle of law. But that case shows that there was no intention to injure any property at all; therefore there was no intent to commit the crime mentioned in the Act.

BOWEN, L. J.—I am also of opinion that this conviction should be affirmed. It is quite clear that this offence was committed without any malice in the mind of the prisoner, and that he had no intention of wounding Ellen Rolston. The only difficulty that arises is from *Reg. v. Pembliton*, which was a case under an act of parliament which does not deal with all malice in general, but with malice toward property; and all that case holds is, that though the prisoner would have been guilty of acting maliciously within the common law meaning of the term, still he was not guilty of acting maliciously within the meaning of a statute which requires a malicious intent to injure property. Had the prisoner meant to strike a pane of glass, and without any reasonable expectation of doing so injured a person, it might be said that the malicious intent to injure property was not enough to sustain a prosecution under this statute. But, as the jury found that the prisoner intended to wound Chapple, I am of opinion that he acted maliciously within the meaning of this statute.

FIELD, J.—I am also of opinion that this conviction must be affirmed. I think this a very important case and one of very wide application, and am very glad that it has come before this court, and has been carefully considered and decided so that there may be no doubt about the matter.

MANISTY, J.—I do not propose to add more than a few words. The facts in this case raise an exceedingly important question, because the man Chapple, who was intended to be struck, was standing close by the woman who was wounded, and who was talking to him; and the prisoner intending to strike Chapple with the belt did strike him, but the belt bounded off and struck Ellen Rolston. It seems to me that the first and second findings of the jury justify the conviction, because they are in these terms: "The jury found that the blow was unlawful and malicious, and that it did in fact wound Ellen Rolston;" and that being so, I think that the third finding does not entitle the prisoner to an acquittal. It is true he did not intend to strike Ellen Rolston, but he did intend to strike Chapple; and in doing so wounded Ellen Rolston; therefore I think that the third finding is quite immaterial, and this conviction should be affirmed.

Conviction affirmed.

STATE v. GILMAN.

1879. SUPREME COURT OF MAINE. 69 Me. 163, 31 Am. Rep. 257.

APPLETON, C. J.¹²—This is an indictment charging the defendant, in the first count, with an assault upon one John Flood, with a dangerous weapon, with intent to kill and murder; in the second count with an assault to kill, and in the third count with an aggravated assault.

The assault in question was made by deliberately discharging a loaded gun into a crowd, by which Flood was wounded.

1. The counsel for the defendant requested the following instruction to be given: "That it is incumbent upon the government, in order to sustain the charge under the first and second counts in the indictment, to prove beyond a reasonable doubt that the specific intent there charged actually and in fact existed in the mind of the defendant at the time he committed the act; that it is incumbent upon the government, if it would establish an intent to kill, to prove beyond a reasonable doubt that, at the time he committed the act, the defendant in fact intended and designed to take life."

The court instructed the jury that it was incumbent upon the state, before it could ask a conviction, to prove the guilt of the accused beyond a reasonable doubt.

¹² Arguments of counsel, part of the instructions to the jury, and part of Appleton's opinion are omitted.

The court further, on this branch of the case, instructed the jury as follows: "Had he the intent to kill and murder in making the assault? This is the great element in the first and second counts. Because, as to both of these counts, if there was no intent to kill, then the crime charged on the prisoner in those counts is not made out. It is incumbent upon the state to prove that the prisoner in fact intended to kill John Flood, under the rule that I shall give you."

This instruction includes the "specific intent" as in fact existing in the mind of the defendant, and embraces all the elements of the request.

II. The defendant's counsel requested the presiding justice to instruct the jury that, if the defendant in fact intended to kill Noyes, no presumption arises from that fact that he intended to kill John Flood.

Instead of such instruction, the following, which constitutes the basis of the defendant's complaint, was given:

"It is maintained by counsel that, if he (the defendant) had an intent to kill Mr. Noyes, and discharged the gun, and the gun took effect upon Mr. Flood, that the intent to kill Mr. Noyes is not sufficient to constitute the crime charged against the prisoner, of intent to kill Mr. Flood. Upon this point in the case I instruct you that, if the prisoner in discharging the gun intended to kill Mr. Noyes, or any other person, any one of those assembled there on that occasion, and the charge which he fired from the gun took effect upon Mr. Flood, that is sufficient to constitute the offense with which he is charged. The intent to kill characterizes the act, goes with it, and, if the blow reaches any person, it carries with it the criminal intent to kill and murder; and if it takes effect upon a person other than the one intended, the crime is made out precisely the same as though the intention had been to kill and murder the person hit, precisely as if death had ensued from the wound inflicted. Though the intention of the party was not to kill the person hit, still, if his intention was to kill any person by a murderous assault, and the blow takes effect upon a person other than the one intended, it is sufficient to constitute the crime of murder, if death ensues, and it is sufficient to constitute the crime charged in the indictment if death does not ensue."

"The intent charged in this indictment is an intent to murder, and to establish that essential element in the case, it is necessary that the state proves to your full satisfaction that the prisoner, in making the assault charged upon him, intended to kill John Flood—intended to murder him; and that embraces the element of malice aforethought."

Here is the case of a man firing a loaded gun deliberately into a crowd. The ruling is that, if intending to "kill Mr. Noyes or any other person, any of the persons assembled there," and the shot took effect upon Flood, the offence as charged would be established—

"Where a blow aimed at one person lighteth upon another, and killeth him, it is murder. Thus, A having malice against B, strikes at and misses him, but kills C; this is murder in A; and if it had been without malice, and under such circumstances that if B had died, it would have been but manslaughter; the killing of C also would have been but manslaughter." Whar. Am. Crim. Law (4th ed.), § 965. "If a man, designing to kill another, kill by mistake a third, the killing of such third person is murder." *Id.*, § 997. If intending to murder A, and supposing B to be A, a person shoots at and wounds B, he may be convicted of wounding B with intent to murder him. A question arose as to the propriety of the conviction under such circumstances. "This conviction is good," remarks Jervis, C. J. "There is no doubt," says Parks, B., "but the prisoner intended to hit Taylor, but he mistook the particular person." *Regina v. Smith*, 33 E. L. & Eq. 567. In *State v. Butman*, 42 N. H. 490, Bell, C. J., in delivering the opinion of the court, says: "If the evidence shows an intent to kill, under such circumstances as to constitute a murder if death had followed, the party may be convicted of an assault with intent to murder." In *Walker v. State*, 8 Ind. 290, the judge charged the jury that, "if the defendant fired into the crowd in question, of which A, the prosecuting witness, was one, with the deliberate intention, either formed at the time or previously, of killing and murdering some one of the crowd, and that A received a portion of the shot and contents of the gun, and was wounded thereby, it will be sufficient to establish the assault and battery with the intent charged." This instruction was held to be sound law.

Had death ensued in this case, there can be no question that the prisoner would have been guilty of murder, whether he killed Noyes, whom he intended to kill, or Flood, whom he did not intend to kill, but whom he did kill.

III. The court were requested to give the following instructions: "The principle of law that every person is presumed to contemplate the ordinary and natural consequences of his own acts, is applicable to cases where death actually ensues; if death does not ensue, then there is no presumption of law, arising from the act alone, that death was intended; and if no consequences at all follow the act, there is no presumption of law that any consequences at all were intended."

Upon the question of intent, the instruction was that "a sane man must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts, and if one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended to destroy such person's life. Upon this branch of the law, I do not say to you that there is a presumption of law when one discharges a loaded gun at another that he intended to

kill. But the rule is that he who discharges a gun must be presumed to intend the natural and ordinary consequences of the act. You can only get at his motives by his act."

The intent precedes and modifies the act. The intent, if criminal, none the less exists, though the act intended fails, by mischance, of its accomplishment. It is the intent which determines the criminality of the act. If A intends to murder B, but the shot slightly wounds, the criminal intent none the less exists, and the assault with the intent to murder is established. So, if the shot intended to murder B hits C, the same result follows. If, when death does not ensue, the presumption is declared to be that death was not intended because death did not ensue, no one could be convicted of an assault with intent to kill. Because the shot does not take effect, though fired with ever so deadly an intent, it does not follow that the natural and ordinary consequences of the act were not intended. The presumption arises from the act and the intention of the act, not from what was accomplished or what failed of accomplishment.

* * *

Exceptions overruled.

Judgment on the verdict.

Walton, Barrows, Peters and Libbey, JJ., concurred.

Virgin, J., did not concur.¹⁸

OGLETREE v. STATE.

1856. SUPREME COURT OF ALABAMA. 28 Ala. 693.

From the opinion of RICE, J.

In the consideration of the charge of the court it is important to bear in mind the nature and ingredients of the alleged offense. The defendant is indicted not merely for what he has effected, but for what he intended to effect; not only for his act, but for the intent with which he did the act. "The charge against him is, that in consequence of a particular intent, reaching beyond the act done, he has incurred a guilt beyond what is deducible merely from the

¹⁸ For cases where the injury took effect on a different person from the one intended, see *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8; *Commonwealth v. Morgan*, 11 Bush (Ky.) 601; *Barens v. State*, 49 Miss. 17, 19 Am. Rep. 1n; *People v. Robinson*, 6 Utah 101, 21 Pac. 403; *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218; *State v. Nash*, 86 N. Car. 650, 41 Am. Rep. 472; *People v. Rahe*, 92 Mich. 165, 52 N. W. 625, 31 Am. St. 575. In *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109, the court sustained a conviction of manslaughter where it appeared that the defendant had unintentionally shot the deceased while the deceased was attempting to prevent the defendant from taking his own life. See also, *State v. Levelle*, 34 S. Car. 120, 13 S. E. 319, 27 Am. St. 799.

act wrongfully performed." 1 Bishop's Crim. Law, § 514. The act, if not accompanied by the particular intent, is simply a misdemeanor; but, if accompanied by the particular intent, it is, by statute, a felony. The particular intent is essential to constitute the felony. The class to which this case belongs is clearly distinguished from that class in which a general felonious intent is sufficient to constitute the offense. * * * And in such a case as the present, the defendant ought not to be convicted of the felony, unless his intent in fact was the same that is laid in the indictment. * * * The burden of proving the intent, as well as the other facts which constitute the felony, is upon the state. The law presumes the defendant innocent of the felony, unless the whole evidence in the case satisfies the jury that he made the assault with the particular intent alleged in the indictment. * * *

REGINA v. PEMBLITON.

1874. COURT OF CRIMINAL APPEAL. 12 Cox Cr. C. 607.

Case stated for the opinion of this court by the Recorder of Wolverhampton.

At the Quarter Sessions of the Peace held at Wolverhampton on the 8th day of January instant Henry Pembrilton was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry Kirkham" contrary to the provision of the Stat. 24 & 25 Vict., c. 97, § 51.

* * * * *

On the night of the 6th day of December, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk" kept by the prosecutor. About eleven o'clock p. m. the whole party were turned out of the house for being disorderly, and they then began to fight in the street and near the prosecutor's window, where a crowd of from 40 to 50 persons collected. The prisoner, after fighting some time with persons in the crowd, separated himself from them and removed to the other side of the street where he picked up a large stone and threw it at the persons he had been fighting with. The stone passed over the heads of those persons and struck a large plate glass window in the prosecutor's house and broke it, thereby doing damage to the extent of £7 12s. 9d.

The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it but not intending to break the window, and they returned a verdict of "guilty," whereupon I respited the

sentence and admitted the prisoner to bail, and pray the judgment of the court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury the prisoner was rightly convicted or not.

(Signed) JOHN J. POWELL,
Recorder of Wolverhampton.¹⁴

LORD COLERIDGE, C. J.—I am of the opinion that this conviction must be quashed. The facts of the case are these: The prisoner and some other persons who had been drinking in a public house were turned out of it about 11 P. M. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others and went to the other side of the street and picked up a stone and threw it at the persons he had been fighting with. The stone passed over their heads and broke a large plate glass window in the prosecutor's house, doing damage to an amount exceeding £5. The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor the proof of these facts alone, coupled with the finding of the jury, will do. Now I think that is not enough. The indictment is framed under the 24 & 25 Vict., ch. 97, § 51. The act is an act relating to malicious injuries to property, and § 51 enacts that whosoever shall unlawfully and maliciously commit any damage, etc., to or upon any real or personal property whatsoever of a public or a private nature, for which no punishment is hereinbefore provided, to an amount exceeding £5, shall be guilty of a misdemeanor. There is also the 58th section which deserves attention. "Every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." It seems to me on both these sections that what was intended to be provided against by the act is the wilfully doing an unlawful act, and that the act must be wilfully and intentionally done on the part of the person doing it, to render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with intending to strike them and not intending to break the window, I think the conviction must be quashed. I do not in-

¹⁴ Part of the statement of facts, and argument of counsel are omitted.

tend to throw any doubt on the cases which have been cited and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offence created by an act in which the words are carefully studied.

BLACKBURN, J.—I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case within the common-law crime of murder when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding £5, shall be guilty of a misdemeanor. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is can the prisoner be said, when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window. I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that on the other side of the men he was throwing at there was a glass window and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think, therefore, that the conviction must be quashed.

FIGOTT, B.—I am of the same opinion.

LUSH, J.—I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that he did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found.

CLEASBY, B., concurred. Conviction quashed.

SCOTT v. STATE.

1886. SUPREME COURT OF ARKANSAS. 49 Ark. 156, 4 S. W. 750.

Appeal from Drew Circuit Court. C. D. Wood, judge.

SMITH, J.¹⁵—* * * The defendant was charged with an assault upon one Primus Bannister with intent, him (the said Primus),

¹⁵ Arguments of counsel, and part of the opinion are omitted.

to kill and murder. It was proved that the defendant was on bad terms with Primus and also with several members of his family, or inmates of his house, and that he repeatedly made threats against all of them. About 10 o'clock of an August night, when the moon was shining brightly and while Primus and his family were sitting in an open hall of his house, the defendant was recognized in the act of creeping along a picket-fence which ran a few yards from the house with a double-barrel shot-gun in his hand. And when he came opposite the hall he discharged first one barrel and then the other amongst the group of persons sitting there. Luckily no serious damage was done. The gun was loaded with squirrel shot and the charge lodged in the house, although a few scattering shot took effect in the persons of some of the family. Primus was not hit.

Upon this state of proof the court gave the following charge:

"Before the jury can convict the defendant of an assault with intent to kill Primus Bannister they must believe, beyond a reasonable doubt, that the defendant shot at Primus Bannister with the felonious intent to kill him, the said Primus Bannister; and if the jury believe from the evidence that it was some one else other than Primus Bannister at whom the defendant shot, or if they have a reasonable doubt as to whom the defendant intended to shoot, they will find defendant not guilty, unless they further find from the evidence that the defendant shot into the house of Primus Bannister and into a crowd where he (Primus Bannister) was at the time situated, without provocation, and when all the circumstances of the shooting show an abandoned and wicked disposition and a reckless disregard of human life upon the part of the defendant."

Doubtless shooting into a crowd is an assault upon each member of the crowd. *State v. Nash*, 86 N. Car. 650; *State v. Meyers*, 19 Iowa 517; *Smith v. Commonwealth*, 100 Pa. St. 324. And probably if the death of any individual results from such reckless conduct, it will be murder; the act being unlawful and the law implying malice, in the absence of circumstances reducing the offence to a lower grade. But the essence of the crime for which the prisoner was indicted was the specific intention to take the life of Primus Bannister. That intent was distinctly alleged, and evidence was offered from which the jury might infer it to have existed in the defendant's mind. Having been alleged, it was necessary to prove it to the satisfaction of the jury.

And no general malevolence, malignity of disposition, or disregard of the sanctity of human life, would supply the place of such proof. 3 *Green. Ev.*, § 17; *Lacefield v. State*, 34 Ark. 275; *Commonwealth v. Harley*, 7 Metc. 506; *Commonwealth v. Kellogg*, 7 Cush. 477.

It follows that the concluding portion of the charge quoted above

was liable to mislead the jury into the belief that proof of the particular intent alleged could be dispensed with.

Reversed for a new trial.¹⁶

STATE v. MECHE.

1890. SUPREME COURT OF LOUISIANA. 42 La. Ann. 273, 7 So. 573.

Appeal from the Thirteenth District Court, Parish of St. Landry. Lewis, J. The opinion of the court was delivered by.

POCHE, J.¹⁷—Under an indictment of nine persons for burglary, five of the defendants were tried and they are now appellants from the several verdicts rendered in the case as hereinafter stated.

* * * * *

The charge against all the accused was:

That they "did feloniously and burglariously, with the intent to kill, in the night time, enter and break the house of Jean Baptiste Duplechin, he, the said John Baptiste Duplechin and his family being lawfully therein; the said Gerassin Meche (and other named accused) being at the time of such breaking and entering armed with dangerous weapons."

* * * * *

The fundamental complaint of all the appellants is in reference to the exclusion of evidence which they persistently sought to introduce for the purpose of explaining their intent in going to the prosecutor's house and the motives which prompted their intent as means to negative the charge of their having broken into the house with the intent to kill. * * *

By reference to the indictment, it will be noticed that the burglary with which the defendants were charged, consisted of their breaking and entering the prosecutor's house in the night time, they being then armed with dangerous weapons, with the sole and restricted intent to kill. They were not charged with the commission of any crime as a sequel or result of such entering.

Hence it follows that the defendants could not be convicted of any other crime but that of breaking and entering, while armed with dangerous weapons, in the night time, with intent to kill.

The pivotal point in the case as presented by the principal bills of exception hinges, therefore, upon the proof of the intent with

¹⁶ In Reg. v. Smith, Dears. C. C. 559, the defendant was indicted for wounding William Taylor with intent to murder him, and the proof showed that he intended to murder one Maloney, supposing Taylor to be Maloney. The court held that the defendant was rightly convicted.

¹⁷ Part of the opinion of Poche, J., and the dissenting opinion of Fenner, J., are omitted.

which the accused parties broke and entered into the house of Duplechin. This conclusion flows not only from the plain text of the statute as read into the indictment, but it finds ample support from the definition of burglary at common law, and in very respectable authorities, both from judicial utterances and from commentaries on the subject.

"Burglary," it is said, is "the name of a crime which consisted at the common law in breaking and entering into the dwelling-house of another in the night with intent to commit some felony within the same, whether the felonious intent was executed or not. * * * The offence is not complete without the felonious intent. A breaking and entering without this is only a trespass." Abbott's Law Dictionary, *verbo* "Burglary."

Commenting on this subject in his work on "Criminal Practice and Pleadings," Archbold says:

"The intent to commit the felony is an essential ingredient in burglary, without which it would be merely a trespass. * * * In general the intent may be presumed from what the offender actually does after breaking and entering; if he commit a felony it may fairly be presumed that he enters for that purpose. * * * But this, like other presumptions, may be rebutted. * * * If a man break and enter the house of another in the night, with intent to beat him only, and in beating him he kill him, it is not burglary; here the presumption would be that he intended to commit a murder; but the presumption is rebutted by showing what his real intent was at the time of breaking and entry." P. 340.

In Roscoe's Criminal Evidence, pp- 365, 366, the same principle is illustrated, as follows:

"If it appear that the intent of the party in breaking and entering was merely to commit a trespass, it is no burglary: as where the prisoner enters with intent to beat some person in the house, even though killing and murder may be the consequence; yet if the prisoner's intention was not to kill, it is still not burglary. * * * The intent must be proved as laid. Thus, if it be laid with intent to commit one sort of felony, and it be proved that it was with intent to commit another, it is a fatal variance." * * *

Applying these principles to the case at bar it is clear that all evidence, whether offered by the prosecution or by the defense, tending to show or prove the real intent with which the offenders broke into the house of Duplechin, was competent, and therefore admissible; with this exception, however, that the state was restricted to proof that the intent was to kill.

But as to the accused, a wider field was open to them, as they were entitled to prove that their intent was anything else but that to kill, even if the intent was in itself unlawful and unjustifiable in law. * * *

The rejected testimony was therefore in law, as well as in justice, admissible for the intended purpose, and the jury would have been the sole judges of its effect on the point in contention.¹⁸

Section 3.—Intent in Statutory Crimes.

REGINA v. TOLSON.

1889. CROWN CASE RESERVED. L. R., 23 Q. B. Div. 168.

Case stated by Stephen, J., and reserved by the court for the consideration of all the judges.

At the summer assizes at Carlisle in 1888 the prisoner, Martha Ann Tolson, was convicted of bigamy.

It appeared that the marriage of the prisoner to Tolson took place on September 11, 1880; that Tolson deserted her on December 13, 1881, and that she and her father made inquiries about him and learned from his elder brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. On January 10, 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony in no way concealed. In December, 1887, Tolson returned from America.

STEPHEN, J., directed the jury that a belief in good faith and on reasonable grounds that the husband of the prisoner was dead would not be a defense to a charge of bigamy, and stated in the case that his object in so holding was to obtain the decision of the court in view of the conflicting decisions of single judges on the point. The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage, and the judge sentenced her to one day's imprisonment.

The question for the opinion of the court was whether the direction was right. If the direction was right, the conviction was to be affirmed; if not, it was to be quashed.

¹⁸ Accord: Holding that the specific intent with which the entry is made, is the gist of the offense, and must be proved. *Price v. People*, 109 Ill. 109; *State v. Green*, 15 Mont. 424, 39 Pac. 322; *Walton v. State*, 29 Tex. App. 163, 15 S. W. 646; but note that the statutory offense of housebreaking or unlawful entry generally does not require the allegation or proof of an intent to commit a felony within the house.

STEPHEN, J.¹⁹—The cases were both reserved by me, *Reg. v. Tolson*, on a trial which both took place at Carlisle on the summer circuit of 1888, and *Reg. v. Strype*, on a trial which took place in December last at Winchester in the autumn circuit of 1888. In each case precisely the same point arose. In each the prisoner, a woman, was indicted for bigamy. In each case the prisoner lost sight of her husband who deserted her, and in each case she was informed that he was dead and believed the information, as the jury expressly found, in good faith and on reasonable grounds. In each case the second ceremony of marriage was performed within the term of seven years after the husband and wife separated.²⁰

For the purpose of settling a question which had been debated for a considerable time, and on which I thought the decisions were conflicting, and not as the expression of my own opinion, I directed the jury that a belief in good faith and on reasonable grounds in the death of one party to a marriage was not a defence to the charge of bigamy against the other who married again within the seven years. In each case I passed a nominal sentence on the person convicted, and I stated, for the decision of this court, cases which reserved the question whether my decision was right or wrong. I am of opinion that each conviction should be quashed, as the direction I gave was wrong, and that I ought to have told the jury that the defense raised for each prisoner was valid. My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase "*non est reus, nisi mens sit rea*." Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead but actually misleading on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a "*mens rea*," or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. "*Mens rea*" means in the case of murder, malice aforethought; in the case

¹⁹ Arguments of counsel, and part of Stephen, J.'s opinion are omitted. Wills, J., concurred in an opinion, in which Charles, J., concurred. Cave, J., concurred in an opinion in which Day, J., and A. L. Smith, J., concurred. Hawkins, J., concurred in an opinion. Manisty, J., dissented in an opinion in which Pollock, J.; Field, J., and Huddleston, J., concurred. Coleridge, C. J., concurred in an opinion. Denman, J., dissented in an opinion.

²⁰ The act claimed to be violated here provided: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, and imprisonment with or without hard labor for not more than two years," with a proviso that "Nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time." 24 and 25 Vict., c. 100, § 57.

of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a "*mens rea*," or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime. It will, I think, be found that much of the discussion of the law of libel in Shipley's case (4 Doug. 73; 21 St. Tr. 847), proceeds upon a more or less distinct belief to this effect. It is a topic frequently insisted upon in reference to political offences, and it was urged in a recent notorious case of abduction, in which it was contended that motives said to be laudable were an excuse for the abduction of a child from its parents.

* * * * *

The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general—I might, I think, say, the invariable—practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meanings of the words "malice," "negligence," and "fraud" in relation to particular crimes have been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, Can any one doubt that a man who, though he might be perfectly

sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. Levet's Case, 1 Hale 474, decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly, *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in Macnaghten's case (10 C. & F. 200), it is stated that if under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A bona fide claim of right excuses larceny, and many of the offenses against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. A very learned person suggested to me the following case: a constable, reasonably believing a man to have committed murder, is justified in killing him to prevent his escape, but if he had not been a constable he would not have been so justified, but would have been guilty of manslaughter. This is quite true, but the mistake in the second case would be not only a mistake of fact, but a mistake of law on the part of the homicide in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected of murder. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter. I think, therefore, that the cases reserved fall under the general rule as to mistakes of fact, and that the convictions ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result.

It is said, first, that the words of 24 and 25 Vict., ch. 100, § 57, are absolute, and that the exceptions which that section contains are the only ones which are intended to be admitted, and this it is said is confirmed by the express provision in the section—an indication which is thought to negative any tacit exception. It is also supposed that the case of Reg. v. Prince, Law Rep. 2 C. C. R. 154, decided

on § 55, confirms this view. I will begin by saying how far I agree with these views. First, I agree that the case turns exclusively upon the construction of § 57 of 24 and 25 Vict., ch. 100. Much was said to us in argument on the old statute, 1 Jac. 1, ch. 11. I can not see what this has to do with the matter. Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

In the first place I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts of 1861, in passing over the general mental elements of crime which are pre-supposed in every case. Age, sanity, and more or less freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words wilfully and maliciously, or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes, but there are some cases in which this can not be said. Such are § 55, on which *Reg. v. Prince*, *supra*, was decided, § 56, which punishes the stealing of "any child under the age of fourteen years," § 49, as to procuring the defilement of any "woman or girl under the age of twenty-one," in each of which the same question might arise as in *Reg. v. Prince*, *supra*; to these I may add some of the provisions of the Criminal Law Amendment Act of 1885. Reasonable belief that a girl is sixteen or upwards is a defence to the charge of an offence under §§ 5, 6 and 7, but this is not provided for as to an offence against § 4, which is meant to protect girls under thirteen.

It seems to me that as to the construction of all these sections the case of *Reg. v. Prince*, *supra*, is a direct authority. It was the case of a man who abducted a girl under sixteen, believing, on good grounds, that she was above that age. Lord Esher, then Brett, J., was against the conviction. His judgment established at much length, and, as it appears to me, unanswerably, the principle above explained, which he states as follows: "That a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England."

Lord Blackburn, with whom nine other judges agreed, and Lord Bramwell, with whom seven others agreed, do not appear to me to have dissented from this principle, speaking generally; but they held that it did not apply fully to each part of every section to which I have referred. Some of the prohibited acts they thought the legislature intended to be done at the peril of the person who did them, but not all.

The judgment delivered by Lord Blackburn proceeds upon the principle that the intention of the legislature in § 55 was "to punish the abduction unless the girl was of such an age as to make her consent an excuse."

Lord Bramwell's judgment proceeds upon this principle: "The legislature has enacted that if any one does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had her father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in any one's possession nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute."

All the judges therefore in *Reg. v. Prince*, *supra*, agreed on the general principle, though they all, except Lord Esher, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrongdoer should act at his peril.

As another illustration of the same principle, I may refer to *Reg. v. Bishop*, 5 Q. B. Div. 259. The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 and 9 Vict., ch. 100, § 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds, that they were not lunatics. I held that this was immaterial, having regard to the scope of the act, and the object for which it was apparently passed, and this court upheld that ruling.

The application of this to the present case appears to me to be as follows: The general principle is clearly in favor of the prisoners, but how does the intention of the legislature appear to have been against them? It could not be the object of parliament to treat the marriage of widows as an act to be if possible prevented as presumably immoral. The conduct of the women convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. Assuming the facts to be as they supposed, the infliction of more than a nominal punishment on them would have been a scandal. Why, then, should the legislature be held to have wished to subject them to punishment at all.

If such a punishment is legal, the following amongst many other cases might occur: A number of men in a mine are killed, and their bodies are disfigured and mutilated by an explosion; one of the survivors secretly absconds and it is supposed that one of the disfigured bodies is his. His wife sees his supposed remains buried; she marries again. I can not believe that it can have been the intention of the legislature to make such a woman a criminal; the

contracting of an invalid marriage is quite misfortune enough. It appears to me that every argument which showed in the opinion of the judges in *Reg. v. Prince*, *supra*, that the legislature meant seducers and abductors to act at their peril, shows that the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties to be a valid and honorable marriage, with a liability to seven years' penal servitude.

It is argued that the proviso that a remarriage after seven years' separation shall not be punishable, operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to show not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would to my mind be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger. * * * My brother Grantham authorizes me to say that he concurs in this judgment.

Conviction quashed.²¹

COMMONWEALTH v. MIXER.

1910. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
207 Mass. 141, 93 N. E. 249.

RUGG, J.—This complaint under St. 1906, c. 421, charges the defendant with illegally transporting intoxicating liquor into the city of Lynn, where no licenses of the first five classes for the sale of in-

²¹ Contra: (Cases collected in foot note, *Commonwealth v. Mixer*, 207 Mass., at p. 148): *People v. Spoor*, 235 Ill. 230, 85 N. E. 207, 126 Am. St. 197; *Parnell v. State*, 126 Ga. 103, 54 S. E. 804; *Cornett v. Commonwealth*, 134 Ky. 613, 121 S. W. 424; *Jones v. State*, 67 Ala. 84; *State v. Goodenow*, 65 Maine 30; *State v. Hughes*, 58 Iowa 165, 11 N. W. 706; *Medrano v. State*, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. 775; *Commonwealth v. Mash*, 7 Metc. (Mass.) 472; *Commonwealth v. Thompson*, 11 Allen (Mass.) 23, 87 Am. Dec. 685. In *State v. Armington*, 25 Minn. 29, and *Russell v. State*, 66 Ark. 185, 49 S. W. 821, 74 Am. St. 78, it was held that it was no defense to a prosecution for bigamy, that the defendant believed that he had been divorced from his first wife, such divorce being in fact invalid. In *State v. Audette*, 81 Vt. 400, 70 Atl. 833, 130 Am. St. 1061, it was held that the defendant was not guilty of adultery, where he believed that the woman with whom he lived was his legal wife, in ignorance of the fact that she had a husband living.

toxicating liquor and no permits to transport such liquor into the city had been granted. The defendant, a driver in the employ of a common carrier, had upon his load for transportation in Lynn a sugar barrel, not marked by the seller or consignor as required by R. L., c. 100, § 49, for packages containing intoxicating liquor. There was nothing about the appearance of the barrel to cause suspicion as to its contents, and the defendant was ignorant of the fact that it contained intoxicating liquor. In the Superior Court the presiding judge refused to instruct the jury that unless the defendant knew that the barrel contained intoxicating liquor or from its appearance and all the circumstances ought reasonably to have been put on inquiry as to its contents, he should be acquitted. The question presented is whether this refusal was error. Broadly stated the inquiry is whether a common carrier or his servant can be convicted of the crime of illegally transporting intoxicating liquor under the statute, when he does not know and has no reason to surmise that there is intoxicating liquor in a package delivered for transportation by a seller or consignor who had violated the law by failing to mark such package plainly and legibly with the kind and amount of liquor it contains.

In the prosecution of crimes under the common law apart from statute, ordinarily it is necessary to allege and prove a guilty intent, and as a general principle a crime is not committed if the mind of the person doing the act is innocent. An evil intention and an unlawful action must concur in order to constitute a crime. But there are many instances in recent times where the legislature in the exercise of the police power has prohibited under penalty the performance of a specific act. The doing of the inhibited act constitutes the crime and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute. There are many illustrations of such exercise of legislative power, as for instance, the selling of milk below a designated standard, *Commonwealth v. Wheeler*, 205 Mass. 384, *Commonwealth v. Warren*, 160 Mass. 533; the driving of an unregistered automobile, *Feeley v. Melrose*, 205 Mass. 329, 334; being present where gaming implements are found, *Commonwealth v. Smith*, 166 Mass. 370; obstructing a highway more than five minutes even through unlawful interference by trespassers, *Commonwealth v. New York Central & Hudson River Railroad*, 202 Mass. 394; bigamy and adultery by marriage with one honestly, upon reasonable ground but mistakenly, supposed to be single, *Commonwealth v. Mash*, 7 Metc. 472; *Commonwealth v. Thompson*, 11 Allen

23; *Commonwealth v. Hayden*, 163 Mass. 453, 457; killing for sale an animal under a designated age, *Commonwealth v. Raymond*, 97 Mass. 567; being present where implements for smoking opium are found, *Commonwealth v. Kane*, 173 Mass. 477; admitting a minor to a billiard hall, *Commonwealth v. Emmons*, 98 Mass. 6; selling adulterated milk, *Commonwealth v. Farren*, 9 Allen 489; storing and selling naphtha, *Commonwealth v. Packard*, 185 Mass. 64; *Commonwealth v. Wentworth*, 118 Mass. 441; sale of imitation butter inadvertently not wrapped as directed by the employer and required by law, *Commonwealth v. Gray*, 150 Mass. 327. See also *Commonwealth v. Lavery*, 188 Mass. 13; *Commonwealth v. Murphy*, 165 Mass. 66; *Commonwealth v. Connelly*, 163 Mass. 539; *Commonwealth v. Shea*, 150 Mass. 314; *Commonwealth v. Julius*, 143 Mass. 132; *Commonwealth v. Dyer*, 128 Mass. 70. This principle has been very frequently applied to statutes respecting intoxicating liquor. In *Commonwealth v. Boynton*, 2 Allen 160, it was held that one could be convicted of selling intoxicating liquor even though he had no reason to suppose that it was intoxicating. To the same effect see *Commonwealth v. Goodman*, 97 Mass. 117; *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Savery*, 145 Mass. 212; *Commonwealth v. Daly*, 148 Mass. 428; *Commonwealth v. O'Kean*, 152 Mass. 584. The sale by a licensed liquor dealer to a minor, though made in good faith and without reason to suspect that the purchaser was below age, *Commonwealth v. Stevens*, 153 Mass. 421; *Commonwealth v. Finnegan*, 124 Mass. 324; or to one honestly but erroneously supposed to be a guest on the Lord's day, *Commonwealth v. Regan*, 182 Mass. 22; *Commonwealth v. Joslin*, 158 Mass. 482, 497; *Commonwealth v. Barnes*, 138 Mass. 511, have all been held crimes under statutes of this nature. This rule prevails generally though not universally throughout the United States. See cases collected in 12 Ann. Cas. 470, 6 L. R. A. (N. S.) 477 and 25 L. R. A. (N. S.) 669. It was assumed in *Commonwealth v. Riley*, 196 Mass. 60, that the crime created by R. L., c. 100, § 50, of delivery by a regular expressman of intoxicating liquor without entering it in a book belonged to this class.

It becomes necessary to examine the terms and history of the statute upon which the present complaint is founded, and the antecedent enactments of the legislature touching the general subject, to determine whether it falls in the same class. The local option license law now prevailing was first enacted by St. 1875, c. 99. It contained no provision respecting the transportation of liquors. By St. 1878, c. 207, the transportation of intoxicating liquors into municipalities where licenses were not granted, with intent to sell or having reasonable cause to believe that they were intended to be sold in violation of law, was forbidden, and whoever wilfully violated any provision of the law was subject to punishment. In a respect

immaterial to the present inquiry, this statute was amended by St. 1879, c. 282. By the consolidation of pre-existing enactments in Pub. Stats. 1882, c. 100, § 18, the word "wilfully" was omitted, and has not since appeared in any statute touching the transportation of intoxicating liquor.

Stat. 1897, c. 271, required plain and legible marking of the packages with the name of the consignee and the keeping of minute records by the common carrier respecting all packages containing intoxicating liquor. These provisions were re-enacted in Rev. Laws, c. 100, §§ 49-53, both inclusive.

By St. 1906, c. 421, the legislature made still more stringent and detailed provisions respecting the transportation of liquor into or through no license municipalities. It was enacted by § 1 of this act, under which this complaint is framed, that "No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do * * *"; and by § 4 that "Any person violating the provisions of this act shall be punished by a fine * * * or by imprisonment * * * or by both * * * and any violation of the laws relative to the transportation of intoxicating liquors, by a person holding a permit * * *, shall render such permit void." §§ 2 and 3 of this act make provision for the granting of permits for the transportation of liquors in so-called no license cities and towns.

It is obvious from these successive enactments that the legislature has been struggling to make it more and more difficult to transport liquor secretly into cities and towns where licenses are not granted. It was said by Hammond, J., in *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, at p. 315, while discussing the purpose of St. 1897, c. 271: "The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defense that the liquors found in the possession of the carrier were for delivery by him as such to some person. It is only one of the many statutes which indicate that the policy of the commonwealth is to require that the traffic in liquors in this state shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be the more easily detected."

The desire of legislative bodies to restrict intemperance by regulation of the transportation and sale of intoxicating liquor is almost universal. It was said in *Scott v. Donald*, 165 U. S. 58, 91: "The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing

to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief."

No question of constitutionality arises in the present case, for the statute under which this complaint is made is not open to objection in that regard. *Commonwealth v. Peoples Express Co.*, 201 Mass. 564, 575.

It is earnestly urged in the present case, however, that the defendant's employer, being a common carrier and as such bound to accept all packages offered to him for transportation, and as a general rule having no right to compel a shipper to disclose its contents to him when there is no reason to suspect that the package contained an illegal or dangerous object (*Crouch v. London & Northwestern Railway*, 14 C. B. 255, *Parrott v. Wells, Fargo & Co.*, 15 Wall. 524, [the nitro-glycerine case]), the statute ought not to be interpreted in such a way as to render him criminally liable if he was in fact innocent of any intent to transgress the law; and it is further pointed out in support of this argument that courts of other jurisdictions have held carriers liable for refusing to transport liquors contrary to an illegal local ordinance, *Southern Express Co. v. Rose Co.*, 124 Ga. 581, and where the carrier had reason to believe that it would be illegally sold after delivery. *Crescent Liquor Co. v. Platt*, 148 Fed. Rep. 894. See cases collected in 6 Cyc. 372 B.

Notwithstanding these considerations, we are not inclined to relax the rule so plainly laid down in many cases, nor to interfere with the policy of the legislature respecting the regulation of transportation and sale of intoxicating liquors. While the rule may seem harsh at first sight in some of its applications, this raises not a question of judicial construction but of legislative policy with which the courts can not interfere so long as no constitutional guaranty is infringed. Although the severity of the rule "has been criticised with inadequate understanding of the grounds for it" (*Commonwealth v. Regan*, 182 Mass. 22, 25), they are pointed out with clearness by *Holmes, J.*, in *Commonwealth v. Smith*, 166 Mass. 370, at 375, in this language:

"When according to common experience a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent, or even short of that, when it is very desirable that people should find out whether the further elements are there, actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and in the pursuit of its policy may make the preliminary fact enough to constitute a crime."

The legislature may say with respect to transportation of liquors that ordinarily common carriers do not transport them without either knowing or having reasonable ground to suspect their nature, or that usually packages containing them give some evidence of their con-

tents to those reasonably alert to detect it, or that directly or indirectly some information generally is conveyed to the carrier as to their character. See also *Keller v. United States*, 213 U. S. 138, 150. The language of the statute under consideration is plain and unequivocal. It contains no words, such as "wilfully" or "knowingly," indicating a vicious intent as a part of the crime created. There is nothing about it to suggest an exception for the benefit of one who without moral blame violates its terms. Its phraseology discloses a legislative determination that society can best be protected against the evil aimed at by a rigorous application of an inflexible rule. There is no distinction in principle between this and the many other statutes construed in the cases we have cited. It must be assumed that the legislature in enacting this statute in its present form had in mind the construction placed upon similar statutes. The inference is irresistible that it intended no different meaning or interpretation from that expressed in other laws of like character. Moreover, railroads and street railways, common carriers which do not deliver merchandise to houses or places of business, are exempted from the operation of the statute although they are subject to the provisions of R. L., c. 100, § 49, as are all shippers of intoxicating liquor, whether by railroad, railway or other carrier. This circumstance tends to emphasize its application to those carriers who deliver goods in such a way as to make especially difficult of detection violations of the law. Evasion of laws of this kind is well known to be more likely to be practiced when small quantities are involved. Taking into account the magnitude of the evils arising from the use of intoxicating liquors and the manifest struggle of the legislature by successive enactments to regulate its transportation so that secrecy may be prevented, and so that those municipalities which have voted "no license" may be protected from furtive and slyly clandestine efforts to override the popular desire for freedom from its illicit traffic, an exemption ought not to be read into the statute contrary to what seems to be a deliberate legislative purpose based upon grounds of public policy. It follows from what has been said that the carrier has a right to use any reasonable efforts by the establishment and publication of general rules, by specific inquiry, or in proper cases by the inspection of packages, or otherwise, to ascertain whether intoxicating liquors constitute any part of the goods offered for transportation, and to refuse to take any as to which this right is denied, in order to protect himself against committing the crime created by the statute. The nitro-glycerine case, *Parrot v. Wells, Fargo & Co.*, 15 Wall. 524, involved only the civil liability to third persons at common law on the ground of negligence of a carrier, who had ignorantly and innocently received for transportation nitro-glycerine which exploded in transit. In the opinion, at page 536, from the general statement that the carrier has no right to

require a knowledge of the contents of packages, instances of special legislation conferring such rights are exempted. In *Crouch v. London & Northwestern Railway*, 14 C. B. 255, there was refusal to receive general merchandise offered by transportation merely because of declination by shipper to disclose the contents of the package, but without placing the demand for such knowledge on the terms of St. 8 and 9 Vict., c. 20, § 105, which authorized the carrier to refuse to receive explosives. It is apparent from what is said by Jervis, C. J., at p. 291, that if the refusal to receive had been based upon the terms of this section a different result might have been reached. The general rule upon which the defendant relies to the effect that a carrier can not insist ordinarily upon obtaining knowledge of the character of goods offered for transportation is subject to a well recognized exception where a statute expressly or impliedly confers that right. The statute with which we are dealing is of that class, and by its imposition of criminal responsibility for transporting the prohibited articles necessarily clothes the carrier with power to obtain such knowledge as may protect him, or to refuse to take the proffered goods. See *Bernard v. Adams Express Co.*, 205 Mass. 254; *Connors v. Cunard Steamship Co.*, 204 Mass. 310.

Apparently the Supreme Court of Vermont reached an opposite conclusion in *State v. Goss*, 59 Vt. 266. It is to be noted, however, that in *State v. Audette*, 81 Vt. 400, the same court has held that an erroneous though honest and reasonable belief in the previous death of an earlier consort of one of two parties to a marriage is a defense to a charge of adultery, thus adopting the rule laid down in *The Queen v. Tolson*, 23 Q. B. D. 168, rather than the contrary rule steadily followed in this commonwealth since *Commonwealth v. Mash*, 7 Met. 472, 474, and throughout this country. *State v. Swett*, 87 Maine 99, related to a different kind of crime occurring under distinguishable circumstances, and may not necessarily be inconsistent with the result here reached; but, if it is, we are not disposed to follow it.

Exceptions overruled.

Section 4.—Negligence.

REGINA v. SALMON.

1880. CROWN CASES RESERVED. 14 Cox Cr. C. 494.

Case reserved for the opinion of this court by Lord Coleridge, C. J., at the summer assizes at Wells, 1880.

The three prisoners were tried before me on the 27th day of July, 1880, for the manslaughter of William Wells, a little boy of ten years old. * * * 22

²² Part of the statement of facts is omitted.

Norris for the prosecution—The prisoner who fired the fatal shot was clearly guilty of manslaughter, but the evidence of his identity not being clear, the rule that all persons engaged in a common enterprise are jointly liable will apply. All the prisoners went into the field for a common purpose—rifle practice—and it was their duty to take all proper precautions to prevent any danger to other persons. The plan attached to the case shows that they fired across three highways, and that they were firing too near to the neighbouring gardens, in one of which the deceased boy was.

LORD COLERIDGE, C. J.—I am of opinion that the conviction was right and ought to be affirmed. If a person does a thing which in itself is dangerous, and without taking proper precautions to prevent danger arising, and if he so does it and kills a person, it is a criminal act as against that person. That would make it clearly manslaughter as regards the prisoner whose shot killed the boy. It follows as the result of the culpable negligence of this one, that each of the prisoners is answerable for the acts of the others, they all being engaged in one common pursuit.

FIELD, J.—I am of the same opinion. At first I thought it was necessary to show some duty on the part of the prisoners as regards the boy, but I am now satisfied that there was a duty on the part of the prisoners towards the public generally not to use an instrument likely to cause death without taking due and proper precautions to prevent injury to the public. Looking at the character of the spot where the firing took place, there was sufficient evidence that all three prisoners were guilty of culpable negligence under the circumstances.

Lopes, J., concurred.

STEPHEN, J.—I am of opinion that all three prisoners were guilty of manslaughter. The culpable omission of a duty which tends to preserve life is homicide; and it is the duty of every one to take proper precautions in doing an act which may be dangerous to life. In this case the firing of the rifle was a dangerous act, and all three prisoners were jointly responsible for not taking proper precautions to prevent the danger.

Watkin Williams, J., concurred.

Conviction affirmed.

PEOPLE v. SMITH.

1907. SUPREME COURT, TRIAL TERM, NEW YORK COUNTY.
105 N. Y. S. 1082.

Alfred H. Smith was indicted for manslaughter, and demurs to the indictment. Demurrer overruled.

GIEGERICH, J.—The indictment sets forth that on February 16, 1907, the New York Central & Hudson River Railroad Company was a corporation duly authorized to operate a railroad for transporting passengers, and that at a certain point on its track there was a curve, "along and upon which said line of railroad and around which said curve the said corporation did then and there operate and cause to run a certain train of railroad cars drawn by two certain locomotive engines propelled by electricity and governed and controlled by an employe of the said corporation known as a locomotive engineer." Also that on the day named the defendant was vice-president and general manager of the corporation, "and as such officer and general manager had charge of and control over the maintenance of tracks and roadbed of the said corporation along the said line of railroad there, and the operation of all trains along and over the said line of railroad there, and the operation of the train of railroad cars drawn by the two locomotives aforesaid, and the employment and instruction of the locomotive engineers of all locomotives, drawing all such trains, and of the engineer governing and controlling the locomotive of the train aforesaid." "And it was then and there the duty of the said Alfred H. Smith, as such officer and general manager, as aforesaid, thus in charge of and control over the operation of the said train, as aforesaid, and the employment and instruction of the said locomotive engineers, as aforesaid, to ascertain and know at what speed it was safe for the said train to pass along the said line of railroad and around the said curve, and to use and exercise and cause to be used and exercised all proper, reasonable, and effective measures and all means within his power to prevent said train from passing along the said line of railroad and around the said curve at a speed faster than was safe for the said train to so pass, and to place the said train under the government and control of a locomotive engineer properly trained and experienced and competent to run the said train with safety along the said line of railroad and around the said curve." But that the defendant, knowing the facts and his duty, as aforesaid, wholly omitted to ascertain at what speed it was safe for the train to pass around the curve, and placed the train under the control of a locomotive engineer not properly trained and not experienced and not competent to run the train with safety around said curve. It is further alleged that by reason of the culpable negligence of the defendant the train was run at a dangerous speed and left the rails and was wrecked, thereby causing the death of one Clara L. Hudson, a passenger. The indictment is demurred to, and various defects are claimed to exist in the same. Upon the general propositions of law there seems to be no dispute; the controversy being upon the application of the principles. It is recognized by both sides that, to render one responsible for the fatal consequences of the malperformance or non-

performance of duty, the duty must have been a plain one which he was bound by law or contract to perform personally. Wharton on Homicide (3d ed.), § 447 *et seq.*; *United States v. Knowles*, 4 Sawy. (U. S.) 517, Fed. Cas. No. 15,540; *Rex v. Allen*, 7 Carr. & P. 153; *Regina v. Pocock*, 5 Cox. C. C. 172; *Regina v. Haines*, 2 Carr. & K. 368; *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349; *Ainsworth v. United States*, 1 App. D. C., 518. The indictment rests upon § 195 of the Penal Code, which is as follows:

"Section 195. Negligent Use of Machinery.—A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals or property of any kind intrusted to his care or under his control, or by any unlawful, negligent or reckless act, not specified by or coming within the foregoing provisions of this chapter or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree"—which section, it is agreed, is not a new statutory enactment, but is simply a codification of the common-law rule on the subject.

The leading argument advanced in support of the demurrer is that there is a failure to allege that the defendant omitted any personal duty imposed on him by law or contract, or that he personally committed any negligent act. In this I can not agree. That the control of the train and selection of the engineer fell within the province of the defendant's duty is sufficiently alleged, as is shown by the portions of the indictment above quoted. It is also alleged that he wholly omitted to use any proper, reasonable, or effective measures, or to cause to be used any of the means within his power to prevent excessive and unsafe speed. Such omission was clearly the neglect of a personal act of management which, by the nature of his duties, was incumbent upon him to perform. So, too, the allegation that he placed the train in the control of an untrained and inexperienced engineer not competent to run it with safety around the curve in question is an allegation of a personal act of negligence on his part. I am asked to take judicial notice of the obligations imposed upon the defendant as general manager of the great railway system of which he was in charge, and of the fact that by reason of their magnitude the defendant could not have been charged with the personal performance of the duties the indictment alleges were imposed upon him. It is said that the court should not entertain the idea that it is every one's personal duty to do that which is impossible for him to do personally. It is enough on this point to say that no such case is presented.

It was not only possible for the defendant personally to cause proper measures to be taken for ascertaining what was a safe rate of speed around the curve in question, and for providing proper regulations against running trains in excess of such speed and for procuring trained and competent engineers; but it is manifest that in any properly conducted system of railroad administration such per-

sonal duty must have rested upon someone. Duties of supervision and management are just as much personal as are the manual duties of the least skilled employe of the road. If this particular duty, which the indictment avers was the defendant's, in fact belonged to some other officer of coordinate rank, or had been intrusted by the defendant to some carefully chosen and competent subordinate, so as to relieve him from further personal responsibility, these are facts that can be shown at the trial; but for the present purposes the allegations of the indictment must be taken as verities, and those allegations are that it was a part of the defendant's employment to perform the acts of supervision and management specified, which he in part failed to perform and in other respects improperly performed.

That the death described in the indictment was a direct and immediate consequence of such acts and omissions is also sufficiently alleged. It may be, as the learned counsel for the defendant argue, that, however incompetent the engineer, he might still have known at what rate of speed it was safe to pass around the curve, and have been able to control the speed of the train, and that it was his negligence in not so doing that was the proximate cause of the disaster. It is conceivable that such was the state of facts; but it would not be a fair construction of the language of the indictment to say that it is silent on this point, or that it does not by fair intendment allege the contrary. It is alleged that the defendant failed to ascertain what was a safe rate of speed around the curve or to take any measures to prevent the train being run at a dangerous rate, and that he placed it in charge of an untrained, inexperienced, and incompetent engineer, by reason whereof the death described occurred. To assume that such untrained, inexperienced, and incompetent engineer knew something which the manager of the road had taken no measures to ascertain, and so knowing had, nevertheless, endangered his own and other lives by running the train at an unsafe speed, and to disregard the allegation that the disaster was due to the specified acts and omissions of the defendant, would not be giving a reasonable construction to the language used and would require too much of the pleaders. All that the statute requires (§ 275 of the Code of Criminal Procedure) is that the indictment shall contain a "plain and concise statement of the acts constituting the crime without unnecessary repetition." *People v. Alderdice* (Sup.), 105 N. Y. Supp. 395. That requirement, in my judgment, has been complied with by this indictment, which in many of its features is very like the one examined and approved by the Court of Appeals in *People v. Buddensieck*, 4 N. Y. Cr. R. 230.

The demurrer is therefore disallowed, with leave to defendant, at his election, to plead to the indictment at such time as shall be provided for in the order to be entered hereon on two days' notice

of settlement, and in the event of his failure to do so a plea of not guilty will be entered, as provided by § 330 of the Code of Criminal Procedure.

STATE v. TUCKER.

1910. SUPREME COURT OF SOUTH CAROLINA. 86 S. Car. 211,
68 S. E. 523.

Before Shipp, J., Union, February term, 1910. Affirmed.

Indictment against Russell Tucker for murder. From sentence for manslaughter, defendant appeals.

July 4, 1910. The opinion of the court was delivered by

MR. CHIEF JUSTICE JONES.—The defendant, under an indictment for murder, was convicted of manslaughter and sentenced to two years at hard labor on the public works of the county.

The testimony for the state tended to show that, in Union county in December, 1909, at night, the defendant, who had never handled a pistol before, got his father's pistol out of the bureau, and was "projecting" around with it in the room in presence of the deceased, a boy about ten years old, his sister, and one or more other smaller children. Defendant, whose age is not stated, had playfully snatched a dime from the pocket of his sister, and the sister tried to recover it when defendant said to her: "If you don't sit down, I am going to shoot you." The sister sat down and then the deceased tried to take the money from defendant, and defendant told him if he didn't sit down he was going to shoot, and deceased said, "No, you won't, either." Then defendant said: "If you don't believe it, hold out your hand, I will show you." Then deceased held out his hand and snatched it back.

Shortly afterwards the pistol fired, the ball striking deceased in the neck and killing him; whereupon the defendant said: "Lord have mercy, did I shoot him?" and being frightened, ran off for a couple of hours and returned. The deceased was a half brother of the defendant.

The defendant testified that he was sitting down rubbing the pistol, and that deceased was sitting down by his side when he commenced, and that without knowing that it was loaded or that his brother was in front of him, pulled the trigger without meaning to do so.

From the foregoing statement, it is clear that there was some testimony of criminal carelessness in handling the pistol, which resulted in homicide.

Exception is taken to the following charge to the jury:

"Where a person handles firearms in a criminally careless way, and

causes the death of some person, he would be guilty of manslaughter. Now, it is necessary for me to define to you what we mean by carelessness or negligence. Negligence is the want of due care; it is the failure to observe due care under the circumstances, or I might put it this way; it is the failure to do that which a person of ordinary firmness and reason would have done under the circumstances, or it is doing something that a person of ordinary care and prudence would not have done under the same circumstances. Now, that is the question of fact for you. The defendant comes into court charged with the taking of the life of Nick Tucker. He says that he did; that it was an accident. Now, the question before you is whether or not in taking the life of Nick Tucker, the defendant here was guilty of criminal carelessness in the sense that I have defined it to you. Inquire would a person of ordinary prudence, surrounded by the same circumstances that surrounded him at the time, have acted in the same way that he did?"

The error assigned is that the court thereby charged that criminal carelessness upon which a verdict of guilty of involuntary manslaughter could be based, was to be determined by the standard of simple negligence or carelessness or mere inadvertence; whereas, it is submitted that criminal carelessness involves that degree of lack of care amounting to recklessness or gross carelessness.

The point raised has been expressly ruled against appellant's contention in the case of *State v. Gilliam*, 66 S. Car. 423, 45 S. E. 6, which sustained a charge like the one complained of and held, that a person who causes another's death by the negligent use of a pistol or gun is guilty of manslaughter, unless the negligence is so wanton as to make the killing murder.

The judgment of the circuit court is affirmed.²³

STATE v. GOETZ.

1910. SUPREME COURT OF ERRORS OF CONNECTICUT.
83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 458.

Information for manslaughter, brought to the Superior Court in Fairfield county and tried to the jury before Williams, J.; verdict and judgment of guilty, and appeal by the accused. No error.

²³ Many courts hold that to impose criminal responsibility, the negligence must have been gross or culpable under the circumstances, as opposed to that degree of negligence which would cause only civil liability for damages. See *White v. State*, 84 Ala. 421, 40 So. 598; *Reg. v. Elliott*, 16 Cox Cr. C. 710; *Reg. v. Doherty*, 16 Cox Cr. C. 306.

HALL, C. J.²⁴ The information charges the defendant with manslaughter in having wilfully and feloniously assaulted and killed one Sarah Howe, at Stamford, on the 9th day of January, 1909, by running over her with an automobile, to which he pleaded not guilty.

The state claimed to have proved these facts: At about seven o'clock in the evening of the day alleged, the deceased, her daughter and another person were standing at a place lighted by a street lamp upon a crosswalk on the north side of the trolley-track on Main street, which runs east and west in the city of Stamford, waiting for a westerly bound trolley-car. The accused, who is a chauffeur, was upon a pleasure trip in company with another person, and was driving or coasting an automobile at a reckless and dangerous rate of speed down a hill on Main street, on the north side of said street, and going in a westerly direction. He saw the deceased and the persons with her, and believed they were waiting for the westerly bound trolley-car which he had just passed; and in order to pass them he, without reducing his speed, turned his automobile southerly and upon the trolley-track, when the decedent and her daughter, alarmed and confused by the rapidly approaching car, and its glaring headlights, endeavored to cross the tracks to the south. The accused, observing this movement of the deceased and her daughter, turned his car sharply to the left, endeavoring, as he said, "to beat them out," when his car skidded along the track, and turned about and overturned, striking the deceased and her daughter and throwing the deceased forward some forty feet, and causing her death.

The accused claimed to have proved that he was running down the hill from eighteen to twenty miles an hour; that he turned his car to the left when he observed the deceased and those with her, because it was apparent that there was not sufficient room between them and the gutter to enable him to pass on the right; that Mrs. Howe and her daughter suddenly ran toward the south when the automobile was within ten feet of the crosswalk, and that he thereupon turned sharply to the south and applied the emergency brake; that he exercised his best judgment in attempting to avoid hitting them, and that the course which he pursued was the most prudent one which he could have taken under the circumstances.

* * * * *

The accused complains of the following language of the court in its charge to the jury: "Unlawfulness is, of course, an essential element of all manslaughter. Where one assaults or attacks another without intending to kill, and causes the other's death, the killing, though unintentional, is unlawful, because of the unlawful act which produced it. The same would be true even if the act which produced the death was not consciously directed against him or her whose death resulted, if the act was in itself unlawful. So it is a general

²⁴ Part of the opinion is omitted.

principle that one who without intention to take life causes the death of another by his own unlawful act, is criminally responsible for the killing. It is a sufficiently accurate statement for any purpose of yours to say that when one causes the death of another without an intention to take life, and while engaged in doing some act in itself unlawful, the killing will be manslaughter. * * * At the time in question it was unlawful for any person to operate a motor vehicle in any public highway of this state recklessly or at a rate of speed greater than was reasonable and proper having regard to the width, traffic and use of such highway, or to operate such motor vehicle so as to endanger the life or limb of any person."

This is but a small part of the charge given. The court clearly instructed the jury that the case of the state rested upon the claim "that the defendant, at the time and place in question, in the operation of a motor vehicle, an automobile, was guilty of criminal negligence which caused or resulted in the death of Sarah Howe. "You will observe," said the court, "the expression 'criminal negligence,' which is recklessness of conduct, gross or wanton carelessness or negligence. * * * 'Gross negligence' imports a thoughtless disregard of consequences. * * * 'Wantonness' in respect to human conduct is doing a thing recklessly, without regard to property or the rights of others." The court further said to the jury: "Do all the circumstances establish beyond a reasonable doubt a degree of carelessness amounting in itself to a culpable disregard of the rights and safety of others? If they do, they establish criminal negligence. If they do not, the homicide with which you are dealing is one that the law excuses as a misadventure. * * * Now, your ultimate inquiry will be, was the defendant criminally negligent, and, if so, did his criminal negligence cause the death of Mrs. Sarah Howe? If you are not satisfied beyond a reasonable doubt that the defendant at the time and place in question was criminally negligent in his conduct in the management of his auto car, and also that such negligence caused the death of Mrs. Howe, as charged, you should acquit him."

The accused has no occasion to complain of the charge. It clearly required the jury, in order to convict, to find beyond a reasonable doubt that the accused, with reckless disregard for the safety of others, so negligently drove an automobile in a public street as to cause the death of Mrs. Howe. One who does such an act is not only liable civilly in damages (*Irwin v. Judge*, 81 Conn. 492, 501, 71 Atl. 572), but is guilty of criminal homicide. *State v. Campbell*, 82 Conn. 671, 677, 74 Atl. 927.

There is no error.

In this opinion the other judges concurred.

COMMONWEALTH v. PIERCE.

1884. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
138 Mass. 165, 52 Am. Rep. 264.

Indictment, in five counts, for manslaughter.²⁵

HOLMES, J. The defendant has been found guilty of manslaughter, on evidence that he publicly practised as a physician, and, being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three days, more or less, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh as in the present case.

The main questions which have been argued before us are raised by the fifth and sixth rulings requested on behalf of the defendant, but refused by the court, and by the instructions given upon the same matter. The fifth request was, shortly, that the defendant must have "so much knowledge or probable information of the fatal tendency of the prescription that [the death] may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness, and not of an honest intent and expectation to cure." The seventh request assumes the law to be as thus stated. The sixth request was as follows: "If the defendant made the prescription with an honest purpose and intent to cure the deceased, he is not guilty of this offence, however gross his ignorance of the quality and tendency, of the remedy prescribed, or of the nature of the disease, or of both." The eleventh request was substantially similar, except that it was confined to this indictment.

The court instructed the jury, that "it is not necessary to show an evil intent"; that, "if by gross and reckless negligence he caused the death, he is guilty of culpable homicide;" that "the question is whether the kerosene (if it was the cause of the death), either in its original application, renewal, or continuance, was applied as the result of foolhardy presumption or gross negligence on the part of the defendant;" and that the defendant was "to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her; that is, that he was able to do so without gross recklessness or foolhardy presumption in undertaking it." In other words, that the defendant's duty was not enhanced by any express or implied contract, but that he was bound at his peril to do no grossly reckless act when in the absence of any emergency or other exceptional circumstances he intermeddled with the person of another.

²⁵ The statement of facts, and arguments of counsel are omitted.

The defendant relies on the case of *Commonwealth v. Thompson*, 6 Mass. 134, from which his fifth request is quoted in terms. His argument is based on another quotation from the same opinion: "To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now, there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription." This language is ambiguous, and we must begin by disposing of a doubt to which it might give rise. If it means that the killing must be the consequence of an act which is unlawful for independent reasons apart from its likelihood to kill, it is wrong. Such may once have been the law, but for a long time it has been just as fully, and latterly, we may add, much more willingly, recognized that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, as that he may by doing acts unlawful for independent reasons, from which death accidentally ensues. 3 Inst. 57; 1 Hale P. C. 472-477; 1 Hawk. P. C., ch. 29, §§ 3, 4, 12; ch. 31, §§ 4-6; Foster, 262, 263 (Homicide, ch. 1, § 4); 4 Bl. Com. 192, 197; 1 East P. C. 260, *et seq.*; Hull's Case, Kelyng 40, and cases cited below.

But recklessness in a moral sense means a certain state of consciousness with reference to the consequences of one's acts. No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one or everybody else might be led to anticipate or apprehend them if the supposed act were done. We have to determine whether recklessness in this sense was necessary to make the defendant guilty of felonious homicide, or whether his acts are to be judged by the external standard of what would be morally reckless, under the circumstances known to him, in a man of reasonable prudence.

More specifically, the questions raised by the foregoing requests and rulings are whether an actual good intent and the expectation of good results are an absolute justification of acts, however foolhardy they may be if judged by the external standard supposed, and whether the defendant's ignorance of the tendencies of kerosene administered as it was will excuse the administration of it.

So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee con-

sequences as a man of ordinary prudence would have in the same situation. In the language of Tindal, C. J., "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." *Vaughan v. Menlove*, 3 Bing. N. Cas. 468, 475; s. c. 4 Scott 244.

If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall in the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest of the safety of all.

There is no denying, however, that *Commonwealth v. Thompson*, 6 Mass. 141, although possibly distinguishable from the present case upon the evidence, tends very strongly to limit criminal liability more narrowly than the instructions given. But it is to be observed, that the court did not intend to lay down any new law. They cited and meant to follow the statement of Lord Hale, 1 P. C. 429, to the effect "that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure, or prevent a disease, and, contrary to the expectation of the physician, it kills him, he is not guilty of murder or manslaughter." If this portion of the charge to the jury is reported accurately, which seems uncertain (6 Mass. 134, n.), we think that the court fell into the mistake of taking Lord Hale too literally. Lord Hale himself admitted that other persons might make themselves liable by reckless conduct. 1 P. C. 472. We doubt if he meant to deny that a physician might do so, as well as any one else. He has not been so understood in later times. *Rex v. Long*, 4 C. & P. 423, 436. *Webb's case*, 2 Lewin 196, 211. His text is simply an abridgment of 4 Inst. 251. Lord Coke there cites the *Mirror*, ch. 4, § 16, with seeming approval, in favor of the liability. The case cited by Hale does not deny it. *Fitz. Abr. Corone*, pl. 163. Another case of the same reign seems to recognize it. *Y. B. 43 Ed. III. 33*, pl. 38, where Thorp said that he had seen one M indicted for killing a man whom he had undertaken to cure, by want of care. And a multitude of modern cases have settled the law accordingly in England. *Rex v. Williamson*, 3 C. & P. 635; *Tessymond's case*, 1 Lewin 169; *Ferguson's case*, 1 Lewin 181; *Rex v. Simpson*, Willcock, Med. Prof., Part 2, ccxxvii; *Rex v. Long*, 4 C. & P. 498; *Rex v. Long*, 4 C. & P. 423; *Rex v. Spiller*, 5 C. & P. 333; *Rex v. Senior*, 1 Moody 346; *Webb's Case*, *ubi supra*; s. c., 1 Mood. & Rob. 405; *Queen v. Spilling*, 2 Mood. & Rob. 107; *Regina v. White-*

head, 3 C. & K. 202; Regina v. Crick, 1 F. & F. 519; Regina v. Crook, 1 F. & F. 521; Regina v. Markuss, 4 F. & F. 356; Regina v. Chamberlain, 10 Cox C. C. 486; Regina v. Macleod, 12 Cox C. C. 534. See also Ann v. State, 11 Hump. 159; State v. Hardister, 38 Ark. 605; and the Massachusetts cases cited below.

If a physician is not less liable for reckless conduct than other people, it is clear, in the light of admitted principle and the later Massachusetts cases, that the recklessness of the criminal no less than that of the civil law must be tested by what we have called an external standard. In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor. The only difference is, that the latter inquiry is still more obviously external to the estimate formed by the actor personally than the former. But it is familiar law that an act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it. If the danger is very great, as in the case of an assault with a weapon found by the jury to be deadly, or an assault with hands and feet upon a woman known to be exhausted by illness, it is murder. Commonwealth v. Drew, 4 Mass. 391, 396; Commonwealth v. Fox, 7 Gray (Mass.) 585. The doctrine is clearly stated in 1 East P. C. 262.

The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them, is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious.

As implied malice signifies the highest degree of danger, and makes the act murder; so, if the danger is less, but still not so remote that it can be disregarded, the act will be called reckless, and will be manslaughter, as in the case of an ordinary assault with feet and hands, or a weapon not deadly, upon a well person. Cases of Drew and Fox, *ubi supra*. Or firing a pistol into the highway when it does not amount to murder. Rex v. Burton, 1 Stra. 481. Or slinging a cask over the highway in a customary, but insufficient mode. Rigmaidon's case, 1 Lewin 180. See Hull's case, *ubi supra*. Or careless driving Rex v. Timmins, 7 C. & P. 499; Regina v. Dalloway, 2 Cox C. C. 273; Regina v. Swindall, 2 C. & K. 230.

If the principle which has thus been established both for murder and manslaughter is adhered to, the defendant's intention to produce the opposite result from that which came to pass leaves him in the same position with regard to the present charge that he would have

been in if he had had no intention at all in the matter. We think that the principle must be adhered to, where, as here, the assumption to act as a physician was uncalled for by any sudden emergency, and no exceptional circumstances are shown; and that we can not recognize a privilege to do acts manifestly endangering human life, on the ground of good intentions alone.

We have implied, however, in what we have said, and it is undoubtedly true, as a general proposition, that a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the results, whether known or unknown. And it may be asked why the dangerous character of kerosene, or "the fatal tendency of the prescription," as it was put in the fifth request, is not one of the circumstances the defendant's knowledge or ignorance of which might have a most important bearing on his guilt or innocence.

But knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. We admit that, if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it, and who had no warning, would not be held liable for the harm. If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance. And therefore, again, if the danger is due to the specific tendencies of the individual thing, and is not characteristic of the class to which it belongs, which seems to have been the view of the common law with regard to bulls, for instance, a person to be made liable must have notice of some past experience, or, as is commonly said, "of the quality of his beast." 1 Hale P. C. 430. But if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another can not escape on the ground that he had less than the common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril. When the jury are asked whether a stick of a certain size was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was. *Commonwealth v. Drew*, *ubi supra*. See also *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 306. So as to an assault and battery by the use of excessive force. *Commonwealth v. Randall*, 4 Gray (Mass.) 36. So here. The defendant knew that he was using kerosene. The jury have found that it was applied as the result of foolhardy presumption or gross

negligence, and that is enough. *Commonwealth v. Stratton*, 114 Mass. 303, 305. Indeed, if the defendant had known the fatal tendency of the prescription, he would have been perilously near the line of murder. *Regina v. Packard*, C. & M. 236. It will not be necessary to invoke the authority of those exceptional decisions in which it has been held, with regard to knowledge of the circumstances, as distinguished from foresight of the consequences of an act, that, when certain of the circumstances were known, the party was bound at his peril to inquire as to the others, although not of a nature to be necessarily inferred from what were known. *Commonwealth v. Hallett*, 103 Mass. 452; *Regina v. Prince*, L. R. 2 C. C. 154; *Commonwealth v. Farren*, 9 Allen (Mass.) 489.

The remaining questions may be disposed of more shortly. When the defendant applied kerosene to the person of the deceased in a way which the jury have found to have been reckless, or, in other words, seriously and unreasonably endangering life according to common experience, he did an act which his patient could not justify by her consent, and which, therefore, was an assault notwithstanding that consent. *Commonwealth v. Collberg*, 119 Mass. 350. See *Commonwealth v. Mink*, 123 Mass. 422, 425. It is unnecessary to rely on the principle of *Commonwealth v. Stratton*, *ubi supra*, that fraud may destroy the effect of consent, although evidently the consent in this case was based on the express or implied representations of the defendant concerning his experience.

As we have intimated above, an allegation that the defendant knew of the deadly tendency of the kerosene was not only unnecessary, but improper. *Regina v. Packard*, *ubi supra*. An allegation that the kerosene was of a dangerous tendency is superfluous, although similar allegations are often inserted in indictments, it being enough to allege the assault, and that death did in fact result from it. It would be superfluous in the case of an assault with a staff, or where the death resulted from assault combined with exposure. See *Commonwealth v. Macloon*, 101 Mass. 1. See further the second count, for causing death by exposure, in *Stockdale's case*, 2 Lewin 220; *Regina v. Smith*, 11 Cox C. C. 210. The instructions to the jury on the standard of skill by which the defendant was to be tried, stated above, were as favorable to him as he could ask.

The objection to evidence of the defendant's previous unfavorable experience of the use of kerosene is not pressed. The admission of it in rebuttal was a matter of discretion. *Commonwealth v. Blair*, 126 Mass. 40.

Exceptions overruled.²⁶

²⁶ For other cases defining the criminal responsibility of physicians for negligence in causing death, see *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5; *Rice v. State*, 8 Mo. 561; *State v. Gile*, 8 Wash. 12, 35 Pac. 417; *State v. Schulz*, 55 Iowa 628, 8 N. W. 469, 39 Am. Rep. 187. For other cases on negligence, see chapter 4, section 3, on "Omission to Act."

Section 5.—Ignorance and Mistake.

"Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do: *Ignorantia eorum que quis scire tenteur, non excusat.*

But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary; and indeed many of the cases of misfortune and casualty mentioned in the former chapter are instances that fall in with this of ignorance; I shall add but one or two more.

It is known in war, that it is the greatest offense for a soldier to kill or so much as to assault his general; suppose then the inferior officer sets his watch or sentinels, and the general, to try the vigilance or courage of his sentinels, comes upon them in the night in the posture of an enemy (as some commanders have too rashly done), the sentinel strikes, or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offense.

In the case of Levet, indicted for the death of Frances Freeman, the case was, that William Levet being in bed and asleep in the night, his servant hired Frances Freeman to help her to do her work, and about twelve of the clock in the night the servant going to let out Frances thought she heard thieves breaking open the door; she therefore ran up speedily to her master and informed him that she thought thieves were breaking open the door; the master rising suddenly, and taking a rapier ran down suddenly; Frances hid herself in the buttery, lest she should be discovered; Levet's wife, spying Frances in the buttery, cried out to her husband, "Here they be, that would undo us." Levet runs into the buttery in the dark, not knowing Frances, but thinking her to be a thief, and thrusting with his rapier before him hit Frances in the breast mortally, whereof she instantly died. This was resolved to be neither murder, nor manslaughter, nor felony. Vide this case cited by Justice Jones, P. 15 Car. 1, B. R. Cro. Car. 538. Cook's case.

1 Hale P. C. ch. 6.

PHELPS v. PEOPLE.

1870. SUPREME COURT OF ILLINOIS. 55 Ill. 334.

Writ of error to the Circuit Court of Iroquois County; the Hon. Charles H. Wood, Judge, presiding.

The opinion states the case.

MR. JUSTICE SHELDON delivered the opinion of the court:

This was an indictment against the plaintiffs in error and Hiram

R. Phelps, their father, for the larceny of forty steers, under which the plaintiffs in error were convicted, at the March term, A. D. 1870, of the Iroquois County Circuit Court.

At the time of the alleged larceny, on the fourteenth day of October, 1869, there existed the following contract in writing between Richard Amerman, in whom the property was laid in the indictment, and Hiram R. Phelps, to-wit:

"Articles of agreement, made and entered into by and between Richard Amerman and Hiram R. Phelps, both of Ashgrove township, Iroquois county, Illinois:

Witnesseth: The said Amerman, of the first part, has sold to the said Phelps, of the second part, a half interest in his cattle, consisting of eighty-one head, and weighing 92,998 pounds, the whole value being five and a half cents per pound, amounting to \$5,114.89. It is agreed that the parties shall both be at equal expense in the costs of feeding, and labor in attending them; the said Amerman to take charge of the cattle and stall, feed them this winter, and sell them at such times as the parties may agree; provided, that they shall not be kept longer than the first of February, 1870; the said Phelps agrees to furnish all his corn at the rate of forty cents per bushel, cut up or gathered. He also agrees to pay interest to the said Amerman, on half the above value of the cattle, at the rate of ten per cent., upon the sale of the cattle. It is agreed that the aforesaid value of the cattle, \$5,114.89, together with the interest due said Amerman from Phelps, shall be paid first, next the costs of the feed and expenses shall be paid, any balance remaining shall be equally divided between the said Amerman and Phelps.

"In witness whereof, we have hereunto set our hands and seals, this twenty-eighth day of September, A. D. 1869.

"RICHARD AMERMAN, [Seal.]

"HIRAM R. PHELPS. [Seal.]

From the time of the making of the contract until the thirteenth day of October following, one of Phelps' boys assisted in taking care of, and herding the cattle. On that day Amerman went to the state of Indiana, and the cattle were taken by a boy of his and one of Phelps' to the place of one Keath, where Amerman and Phelps had engaged pasture for the cattle, and while they were there, the boy of Phelps was alone to attend to and take care of them, and Phelps was to furnish a pound to keep them in at night.

The evidence on the trial tended to show that about sunrise on the morning of the following day, the fourteenth of October, Hiram R. Phelps, the father, and his two sons, the plaintiffs in error, were seen driving forty of the best of the cattle towards Ashkum, a station on the Illinois Central railroad, and that on that day the said Hiram R. Phelps shipped them at that place, giving his name as

Wells; that subsequently he did not disclose this to Amerman, but told him the cattle had got out.

The defendants' counsel asked the court to give the following instruction to the jury, without that portion of it which is italicised, which the court refused to give, but modified the same, by adding to it the words which are italicised, and gave the same as thus modified, to the jury, to which exception was taken:

"18. If the jury believe from the evidence, that Richard Amerman and Hiram R. Phelps were partners in the ownership of the forty head of cattle, alleged to have been stolen, then, although they may further believe from the evidence, that said Phelps drove away and converted the same to his own use, such conversion would not be larceny, even though they believed from the evidence that at the time said Phelps became such partner that he intended to cheat and defraud said Amerman, but the law is otherwise, if you find from the whole contract that only an interest in the profits to be derived from the cattle passed to Phelps."

This instruction declared the law to be, that if, under the contract, only an interest in the profits to be derived from the cattle passed to Phelps, the conversion of them by him was larceny.

The simple conversion of the cattle, under such circumstances, might have been a civil wrong, but would not have amounted to the crime of larceny. To constitute that crime, a felonious intention is an indispensable ingredient. Under our statute making the conversion of goods and chattels by a bailee of them, larceny, in the same manner as if the original taking had been felonious, the crime is not made to consist in the mere conversion of the property to his own use, by the bailee, but in such conversion with an intent to steal the same.

The instruction made the guilt or innocence of Hiram R. Phelps, in case he converted the cattle to his own use, to depend upon whether he was a part owner or not of the cattle.

Although he might not have been a part owner, yet if he drove away and converted the cattle to his own use, under an honest belief that he was such part owner, under the contract in evidence, the crime of larceny could no more have been imputed to him, than if he had actually owned the cattle in part.

The evidence fairly presented before the jury the question, whether the one-half of the cattle embraced in the contract were not driven away and disposed of by Hiram R. Phelps, under an honest belief of a right to do so, or at least that he had a part ownership in the cattle, and the defendants were entitled to have that question freely considered and passed upon by the jury, untrammelled by this instruction, which virtually excluded it from their consideration.

For error in giving this instruction, the judgment is reversed and the cause remanded.

Judgment reversed.²⁷

DOTSON v. STATE.

1878. SUPREME COURT OF ALABAMA. 62 Ala. 141, 34 Am. Rep. 2.

Appeal from Limestone Circuit Court.

Tried before Hon. James E. Cobb.

The appellant, Silas Dotson, was tried and convicted of bigamy.

The state * * * introduced a witness who testified that the appellant was married to his first wife in Lincoln county, Tennessee, in 1868; that they lived together as man and wife for about five years; that his wife left appellant while they resided in Tennessee and returned to Limestone county, Alabama, to which place he soon came; that soon after her return to Limestone county his wife went to Arkansas, where she remained about six months; that a short while before appellant was married the second time, which was in March, 1879, she stayed in about four miles of where he then lived, but he did not know it. It was proved that about twelve months before the second marriage, the appellant had seen his first wife. The State then introduced one Collier, who testified that a month or two before the defendant married last, that he had a conversation with him; that he did not remember and could not repeat the words or language used by the defendant; that the conversation was about the first wife of defendant, in which they discussed where she lived, he, the witness, expressing the opinion that she lived a few miles off, beyond or below, the town of Athens. This witness further testified that the first wife had lived near the defendant and the witness a while after returning from Arkansas, though he, the witness, did not know of it till afterwards, and that she was now living.

It was admitted that the defendant was married the second time in Limestone county in March, 1879.

It was also admitted, that if certain witnesses for the defendant were present, they would swear that in August and September, 1878,

²⁷ Accord: *Morningstar v. State*, 55 Ala. 148; *People v. Husband*, 36 Mich. 306; *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492. In case of offenses where a specific criminal intent is an essential element, mistake of fact may be a defense if it negatives the existence of the intent. See *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575 (passing counterfeit money believing it to be good); *McGuire v. State*, 7 Humph. (Tenn.) 54 (voting with the belief that the necessary qualifications exist); *Andrews v. People*, 60 Ill. 354 (receiving stolen goods); *Tolliver v. State*, 25 Tex. App. 600, 8 S. W. 806 (receiving stolen goods), and cases, *supra*, of killing in self-defense under a reasonable though mistaken belief of the necessity of the act.

they told the defendant that his first wife was dead, and talked to him about the fact, and that several of these witnesses have been with the defendant frequently since, and knew of no circumstances or information he has received since, to the contrary.

This was all the evidence in the case, and the defendant requested the following written charges: 1. If the jury believe from the evidence, that at the time the defendant was married the second time, he believed his first wife was dead, then the defendant must be acquitted. 2. The intent is a material ingredient of the offense. The court refused to give either of said charges, and the defendant separately excepted.

BRICKELL, C. J.²⁸—* * * Construed in connection with and in light of the evidence, the charges requested by the appellant were properly refused. The rule of the common law, of very general application, is that there can be no crime, when the criminal mind or intent is wanting. When that is dependent on a knowledge of particular facts, ignorance or mistake, as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility.—*Gordon v. State*, 52 Ala. 308; *Squire v. State*, 46 Ind. 459 (2 Green. Cr. Rep. s. c. 725). The principle is thus stated by Bishop: "The wrongful intent being of the essence of every crime, the doctrine necessarily follows that, whenever a man is misled without his own fault or carelessness, concerning facts, and while so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally innocent, the same as he is innocent morally."—1 Bish. Cr. Law, § 303. The belief must be honest and real, not feigned, and whether it is honest or feigned, the jury must determine in view of all the evidence. Whether there was fault or carelessness in acquiring knowledge of the facts, is also a matter for their determination. No man can be acquitted of responsibility for a wrongful act, unless he employs "the means at command to inform himself." Not employing such means, though he may be mistaken, he must bear the consequences of his negligence. If he relies on information obtained from others, he should have some just reason to believe that from them he could obtain information on which he may safely rely. It does not appear that the persons informing the appellant of the death of his first wife had any opportunities of knowing the fact, he did not have, nor on what their knowledge of the fact was based; nor was it shown that he made inquiries of persons who, from their relationship or acquaintance with the wife, would have known whether she was living or dead. Bigamy is a violation of positive law, disturbs the peace of families, offends the good order of society, and involves the legitimacy of children, the descent and succession to estates. A degree of diligence commensurate with the

²⁸ Part of the statement of facts, and part of the opinion are omitted.

importance of the act—a second marriage, having had a former wife, not so long absent and unheard of, that the law presumed her death, the appellant should have exercised. The charge requested withdrew from the consideration of the jury the important inquiry, whether the belief of the death of the first wife was reasonable, and of the diligence the appellant had exercised to inform himself of the fact.

The second charge, without explanation, would have misled, or was well calculated to mislead, the jury. It would have induced, or is calculated to have induced, the belief that some other intent than that which must be inferred from the second marriage, knowing the first wife to be living, or not having a reasonable belief of her death, was an ingredient or element of the offense. A charge requested, which requires explanation or qualification, or which has a tendency to mislead or confuse the jury, should always be refused. There is no legal right to such an instruction. The charge in itself, when applied to the facts, is erroneous. A criminal intent is generally an element of crime, but "whatever one voluntarily does, he of course intends to do," and whenever an act is criminal under particular circumstances, the party doing the act is chargeable with the criminal intent. *Commonwealth v. Mash*, 7 Met. 472; *Reynolds v. United States*, 98 U. S. 145. The appellant knew he had been once married—that the marriage had never been dissolved—that his wife had not been so long absent a presumption of her death could be indulged, and by the slightest diligence could have ascertained she was living within a few miles of him. A second marriage was a violation of the law, and he must be presumed to have intended the violation. We are satisfied no error was committed by the circuit court, and the judgment is affirmed.

UNITED STATES v. LEATHERS.

DISTRICT COURT OF THE UNITED STATES.
6 Sawy. (U. S.) 17, 26 Fed. Cas. No. 15581.

HILLYER, J.²⁹—* * * The defendant is charged with trading in the Indian country in one count and with introducing liquors there contrary to the statutes of the United States in another. The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not *malum in se*. The object of the law is not to punish men for these acts as crimes so much as to prevent trading and intercourse with the Indians otherwise than as the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances I think it is immaterial with what intent

²⁹ Part of the opinion is omitted.

the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability (3 Greenl. Ev. § 21), and being such, ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the lines. He is bound to know the facts and obey the law at his peril. (*Id.*, Regina v. Woodrow, 15 Mee. & W. 404; Attorney-General v. Lockwood, 9 *id.* 378; 1 Bish. Crim. L. (4th ed.), 1031, etc.)

In the case of *United States v. Susan B. Anthony*, the defendant was charged with illegal voting. The case was tried by Mr. Justice Hunt, and although it appeared that the defendant sincerely believed she had a right to vote, it was held that this did not excuse her. So on the trial of the inspectors of election for receiving her vote, they proved their good faith, but their ignorance of the want of proper qualifications was held to be no excuse. (Cited in Whart. Crim. L., § 82.)

In the case of *Commonwealth v. Mash*, 7 Metc. 472, a woman who honestly believed her first husband to be dead was convicted of bigamy, he not being in fact dead when she married the second man. In this case sentence was reserved and a full pardon obtained. The same doctrine is maintained in England. (3 Whart. 84.) So in *State v. Ruhl*, 8 Iowa 449, the defendant was not allowed to prove that he believed, or had good reason to believe, the girl he enticed away was over fifteen, the law confining the offense to girls under that age. The same principle was asserted in *Regina v. Alifer*, 10 Cox C. C. 402, one judge saying a man dealt with the girl at his peril, and that it made no difference that the girl told him she was over sixteen.

The following cases are cited in 3 Whart. Crim. L., § 8. It is no defense to an indictment for voting without the proper qualifications, that the defendant believed he had them. No matter how honest his belief is, unless the statute excepts cases of honest belief. To an indictment for publishing a libel, it is no defense that the defendant did not know of the publication. Nor to one for selling liquors to a minor, that the defendant believed the vendee to be of full age. Nor to one for abduction, that the motives were philanthropic, or that the defendant mistook the girl's age.

In this class of cases the offending party is subjected to the penalty for the act done irrespective of his intent, as in civil cases he is required to answer for an act which injures another, however innocent of intentional wrong he may be. My conclusion is, that defendant must be adjudged guilty on both counts. The belief of the defendant in connection with the acts of government agents in setting up the posts can only be considered to determine whether a prosecution shall be begun in the first place, or the degree of punishment

in case of conviction, or as ground for a pardon or remission of the forfeitures and penalties.

The defendant, Leathers, is, therefore, adjudged guilty of the offenses charged and will appear for sentence.

Affirmed on appeal to the circuit court.³⁰

JELICO COAL MINING CO. v. COMMONWEALTH.

1895. COURT OF APPEALS OF KENTUCKY. 96 Ky. 373, 29 S. W. 26.

Judge Grace delivered the opinion of the court.

This is an appeal by the Jellico Coal Mining Company from a judgment of one hundred dollars rendered against it by the Whitely Circuit Court upon an indictment filed in said court on the 18th of May, 1893, charging that said corporation, though doing business in Kentucky, had not, on the 8th day of May, 1893, nor for some time prior thereto, filed a statement by either its president or secretary, in the office of the Secretary of State at Frankfort, Kentucky, giving the location of its principal office and its agent at said place upon whom service of process might be made.

The chief ground relied upon by said appellant for failing to file such a statement is, that it did not know of the existence of the law requiring same to be so filed.

The law of the state, taking effect April 5, 1893, as found in section 571 of Kentucky Statutes, under title, Corporations, requires such a statement to be made. This case was submitted to the jury upon an agreed state of fact, whereby it was agreed "that this law on corporations (having been passed long enough to take effect April 5, 1893) was, by order of the legislature, printed about April 25, 1893, and then distributed by the Secretary of State as fast as possible to clerks of county courts, banks, lawyers and corporations, but that no copy was sent to appellant; and, further, that said corporation, its agents and employes, were, in fact, ignorant of the existence of such statute until the 24th day of May, 1893, when they were informed of same by their attorney, R. D. Hill, and that thereupon said defendant immediately, on the 29th day of May, 1893, filed in the office of Secretary of State at Frankfort the necessary state-

³⁰ In statutory offenses in which criminal intent is not a necessary element, or where the purpose of the statute is to make the defendant act at his peril with regard to the true facts, mistake of fact is not a defense; see *Barnes v. State*, 19 Conn. 398; *Humpeler v. People*, 92 Ill. 400; *State v. Hartfiel*, 24 Wis. 60; *State v. Griffith*, 67 Mo. 287; *Pounders v. State*, 37 Ark. 399; *State v. Newton*, 44 Iowa 45; *Holmes v. State*, 88 Ind. 145; *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. 496.

ment that defendant was, at and before the passage of said law, a corporation created by the laws of Kentucky, doing business in Whitely county, Kentucky, where it had an office and an agent upon whom process could have been served. It was further agreed by the parties that a synopsis of this corporation law was published by some of the daily papers in Louisville about the 6th or 7th of April, 1893, and that said paper circulated in Whitely county, but was not called to the attention of the defendant."

Upon this agreed statement of fact the court instructed the jury to find for the Commonwealth; the usual exceptions were taken, and the case brought up. The counsel for appellant, while conceding the general doctrine "that every person is presumed to know the law," yet insists that this is not an absolute, conclusive presumption, but only one that may be rebutted by evidence and surely that the Commonwealth may agree absolutely and unconditionally, as she did in this case, that appellant was ignorant of the law, and thus agree herself out of court.

We can not view the matter in this light. The maxim, slightly changed, and as applicable to all criminal prosecutions, that "ignorance of the law excuses no one," is one of the oldest and most valuable maxims of criminal procedure; it lies at the very basis of all successful criminal prosecutions.

It is not so much a presumption of fact, as a fact, as it is a conclusion or presumption of the law, indispensably necessary to be made by the courts, alike applicable to all criminal prosecutions. Without it the court would be powerless to maintain any effective and valuable administration of the criminal code. In point of antiquity it dates back to a time whereof the memory of man runneth not to the contrary, and while it may be possible that now and then in isolated cases there may be apparent hardship, yet we are unable to conceive or formulate any modification of the rule whereby appellant in this case can be relieved from the operation of the general principle without utterly destroying same, and such a ruling is not to be thought of.

Let the judgment of the lower court be affirmed.³¹

CUTTER v. STATE.

1873. SUPREME COURT OF NEW JERSEY. 36 N. J. L. 125.

The opinion of the court was delivered by BEASLEY, Chief Justice. The defendant was indicted for extortion in taking fees to which

³¹ It is no defense to a criminal charge that the defendant acted in good faith on advice of counsel. *State v. Goodenow*, 65 Maine 30;

he was not entitled on a criminal complaint before him as a justice of the peace. The defense which he set up and which was overruled was that he had taken these moneys innocently and under a belief that by force of the statute he had a right to exact them.

This subject is regulated by the twenty-eighth section of the act for the punishment of crimes. Nix. Dig. 197. This clause declares that no justice or other officer of this state shall receive or take any fee or reward to execute and do his duty and office, but such as is or shall be allowed by the laws of this state, and that "if any justice, &c., shall receive or take, by color of his office, any fee or reward whatsoever, not allowed by the laws of this state, for doing his office, and be thereof convicted, he shall be punished," etc.

On the part of the state it is argued that this statute is explicit in its terms and makes the mere taking of an illegal fee a criminal act without regard to the intent of the recipient. Such undoubtedly is the literal force of the language, but then, on the same principle, the officer would be guilty if he took, by mistake or inadvertence, more than the sum coming to him. Nor would the statutory terms, if taken in their exact signification, exclude from their compass an officer who might be laboring under an insane delusion. Manifestly, therefore, the terms of this section are subject to certain practical limitations. This is the case with most statutes couched in comprehensive terms, and especially with those which modify or otherwise regulate common-law offences. In such instances the old and the new law are to be construed together; and the former will not be considered to be abolished except so far as the design to produce such effect appears to be clear. In morals it is an evil mind which makes the offence, and this, as a general rule, has been at the root of criminal law. The consequence is that it is not to be intended that this principle is discarded, merely on account of the generality of statutory language. It is highly reasonable to presume that the law-makers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it. And it is this presumption that fully justifies the statement of Mr. Bishop, "that a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act." 1 Crim. Law, § 80.

This doctrine applies with full force to the present case. If the magistrate received the fees in question without any corrupt intent and under the conviction that they were lawfully his due, I do not think such act was a crime by force of the statute above recited.

But it is further argued on the part of the prosecution that as the

Hoover v. State, 59 Ala. 57; Weston v. Commonwealth, 111 Pa. St. 251, 2 Atl. 191; United States v. Anthony, 11 Blatch. (U. S.) 200, Fed. Cas. No. 14459; or that he was a foreigner and did not know the law. Rex v. Esop, 7 C. & P. 456; see also, Cambioso v. Moffet, 2 Wash. C. C. (U. S.) 98, 4 Fed. Cas. No. 2330.

fees to which the justice was entitled are fixed by law, and as he can not set up as an excuse for his conduct his ignorance of the law, his guilty knowledge is undeniable. The argument goes upon the legal maxim, *ignorantia legis neminem excusat*. But this rule, in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se*, or where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled or is obscure, and where the guilty intention being a necessary constituent of the particular offence is dependent on a knowledge of the law, this rule, if enforced, would be misapplied. To give it any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice. The judgments of the courts have confined it to its proper sphere. Whenever a special mental condition constitutes a part of the offence charged, and such condition depends on the question whether or not the culprit had certain knowledge with respect to matters of law, in every such case it has been declared that the subject of the existence of such knowledge is open to inquiry, as a fact to be found by the jury. This doctrine has often been applied to the offence of larceny. The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defense if he can show, in a satisfactory manner, that being under a misapprehension as to his legal rights he honestly believed the articles in question to be his own. *Rex v. Hall*, 3 Carr. & P. 409; *Reg. v. Reed*, Carr. & Marsh 306.

The adjudications show many other applications of the same principle and the facts of some of such cases were not substantially dissimilar from those embraced in the present inquiry. In the case of *The People v. Whaley*, 6 Cow. 661, a justice of the peace had been indicted for taking illegal fees, and the court held that the motives of the defendant, whether they showed corruption or that he acted through a mistake of the law, were a proper question for the jury. The case in *The Commonwealth v. Shed*, 1 Mass. 227, was put before the jury on the same ground. This was likewise the ground of decision in the case of *The Commonwealth v. Bradford*, 9 Metc. 268, the charge being for illegal voting, and it being declared that evidence that the defendant had consulted counsel as to his right of suffrage and had acted on the advice thus obtained was admissible in his favor. This evidence was only important to show that the defendant in infringing the statute had done so in ignorance of the rule of law upon the subject. Many other cases, resting on the same basis might be cited; but the foregoing are sufficient to mark

clearly the boundaries delineated by the courts to the general rule, that ignorance of law is no defense where the mandates of a statute have been disregarded or a crime has been perpetrated.

That the present case falls within the exceptions to this general rule appears to me to be plain. There can be no doubt that an opinion very generally prevailed that magistrates had the right to exact the fees which were received by this defendant, and that they could be legally taken under similar circumstances. The prevalence of such an opinion could not, it is true, legalize the act of taking such fees; but its existence might tend to show that the defendant, when he did the act with which he stands charged, was not conscious of doing anything wrong. If a justice of the peace, being called upon to construe a statute with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues and should act upon such judgment, it would seem palpably unjust and therefore inconsistent with the ordinary grounds of judicial action to hold such conduct criminal if it should happen that a higher tribunal should dissent from the view thus taken and should decide that the statute was not susceptible of the interpretation put upon it. I think the defendant had the right in this case to prove to the jury that the moneys, which it is charged he took extorsively, were received by him under a mistake as to his legal rights, and that as such evidence being offered by him was overruled, the judgment on that account must be reversed.³²

³² Accord: *People v. Powell*, 63 N. Y. 88; *Reg. v. Reed, C. & M.* 306; *United States v. Conner*, 3 McLean (U. S.) 573, Fed. Cas. No. 14847; *State v. Bair*, 71 Ohio St. 410, 73 N. E. 514.

CHAPTER VII.

CRIMINAL RESPONSIBILITY.

Section 1.—Insane Persons.

“As to the first point it is to be observed that those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots and lunatics, are not punishable by any criminal prosecution whatever.

Indeed, it was anciently holden, in respect of that high regard which the law has for the safety of the King’s person, that a madman might be punished as a traitor for killing or offering to kill the king, but this is contradicted by the later opinions.

And it seems agreed at this day that if one who has committed a capital offense become *non compos* before conviction, he shall not be arraigned; and if after conviction, that he shall not be executed.

But by 12 Anne 23, which seems to be agreeable to the ancient common law, a dangerous madman may be kept in prison till he recover his senses; and by the common law, if it be doubtful whether a criminal who at his trial is in appearance a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff of the county wherein the court sits; and if it be found by them that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as one who stands mute.”
1 Hawkins, P. C., ch. 1, §§ 1-4.

McNAGHTON'S CASE.

1843. HOUSE OF LORDS. 10 Clark & F. 200.

The prisoner had been indicted for the murder of Edward Drummond and pleaded not guilty. Witnesses were called to prove that he was not, at the time of committing the act, in a sound state of mind.¹

¹ Edward Drummond, who was the private secretary of Sir Robert Peel, was killed by McNaghton, mistaking him for Peel. His acquittal

LORD CHIEF JUSTICE TINDAL (in his charge): The question to be determined is, whether at the time the act in question was committed the prisoner had or had not the use of his understanding so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

Verdict: Not guilty, on the ground of insanity.

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords, it was determined to take the opinion of the judges on the law governing such cases.

LORD CHIEF JUSTICE TINDAL²: My Lords, her Majesty's judges (with the exception of Mr. Justice Maule, who has stated his opinion to your lordships), in answering the questions proposed to them by your lordship's house, think it right, in the first place, to state that they have foreborne entering into any particular discussion upon these questions from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case on facts proved before them and after hearing argument of counsel thereon, they deem it at once impracticable and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

They have, therefore, confined their answers to the statements of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary in this peculiar case to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such as their unanimous opinion to your lordships.

The first question proposed by your lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the

on ground of insanity aroused such excitement that the questions involving the law on insanity were propounded by the House of Lords to the judges.

² The statement of facts is condensed, and the opinion of Maule, J., is omitted.

alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your lordships to mean the law of the land.

Your lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was

one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your lordships have proposed to us is this: "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your lordships is: "Can a medical man conversant with the disease of insanity who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?" In answer thereto, we state to your lordships that we think the medical man, under the circumstances supposed, can not in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same can not be insisted on as a matter of right.³

³ The rule in *McNaghton's case* is followed in many American cases. See *People v. Coffman*, 24 Cal. 230; *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *State v. Lawrence*, 57 Maine 574; *State v. Knight*, 95 Maine 467, 50 Atl. 276, 55 L. R. A. 373; *Anderson v. State*, 25 Neb. 550, 41 N. W. 357; *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591; *Flanagan v.*

STATE v. JONES.

1871. SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.
50 N. H. 369, 9 Am. Rep. 242.

Indictment against Hiram Jones for the murder of his wife. The defence was insanity. The defendant was found guilty of murder in the first degree.

* * * * *

The defendant excepted to the following instructions given to the jury:

If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be "not guilty by reason of insanity," if the killing was the offspring or product of mental disease in the defendant.

Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury.

Insanity is mental disease—disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance. Insanity is not innocence unless it produced the killing of his wife.

If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible, is a question of fact. Whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact.

Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact.

The defendant is to be acquitted on the ground of insanity, un-

People, 52 N. Y. 467, 11 Am. Rep. 731; Brinkley v. State, 58 Ga. 296; State v. Scott, 41 Minn. 365, 43 N. W. 62; State v. Murray, 11 Ore. 413, 5 Pac. 55.

less the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease.

LADD, J.⁴—* * * When, as in this case, a person charged with crime admits the act, but sets up the defence of insanity, the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent.

In solving that problem, as in all other cases, it is for the court to find the law, and for the jury to find the fact. The main question for our consideration here is, what part of this difficult inquiry is law, and what part fact.

It will be readily agreed, as said by Shaw, C. J., in *Commonwealth v. Rogers*, 7 Metc. 500, that if the reason and mental powers of the accused are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible agent, and, of course, is not punishable for acts which otherwise would be criminal.

But experience and observation show that, in most of the cases which come before the courts, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not thus wholly obliterated the will, the conscience, and mental power, but has left its victim still in possession of some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud the whole mind; or, it may destroy, or only impair the functions of one or more faculties of the mind. There seem to be cases where, as Erskine said in *Hadfield's case*, reason is not driven from her seat, but where distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.

The term, partial insanity, has been applied to such cases by writers and judges, from Lord Hale to Chief Justice Shaw, where, as has been said, "the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging;" and it is here that the difficulty of the subject begins, and that confusion and contradiction in the authorities make their appearance. "No one can say where twilight ends or begins, but there is ample distinction between night and day." We are to inquire whether a universal test has been found wherewith to determine, in all cases, the line between criminal accountability and non-accountability—between the region of crime and innocence—in those cases which lie neither wholly in the darkness of night nor the light of day. If such a test exists or if one can be found, it is of the utmost importance that it be clearly defined and broadly laid down, so that when it

⁴ The statement of facts is condensed, and part of the opinion is omitted.

is given to a jury it may aid rather than confuse them. To ascertain whether a rule has hitherto been found, we must look to the authorities.

* * * * *

The numerical preponderance of authority in England, as gathered from the cases thus far, would seem to be decidedly in favor of the rule that knowledge of right and wrong, without reference to the particular act, is the test; although their force is much shaken, if not wholly overthrown, by the qualifications which judges have seemed to feel at liberty to introduce, to meet their individual views, or the exigencies of particular cases; and especially by the charge of Lord Denman in *Regina v. Oxford*.

The memorable effort of the House of Lords, in 1843, to have the confusion and conflict of opinion which had arisen on this perplexing question all cleared away by one distinct and full avowal by the judges of what the law was and should be in relation to it, is too conspicuous in the history of the subject to be passed without notice.

It may safely be said that the character of the judges, and the circumstances under which the question in *McNaughten's* case (see note to *Regina v. Higginson*, 1 Car. & Kir., at p. 130) were propounded to them by the House of Lords, make it morally certain that if, in the nature of things, clear, categorical, and consistent answers were possible, such answers would have been given. In other words, that if a safe, practical, legal test exists, it would have been then found by those very learned men, and declared to the world. Such a result would have brought order out of chaos, and saved future generations of lawyers and judges a vast amount of trouble in trying this kind of cases. But an examination of the answers shows that they failed utterly to do any such thing; and it is not too much to say that, if they did not make the path to be pursued absolutely more uncertain and more dark, they at best shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth.

In answer to the first question, all the judges, except Maule, say that "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which is meant the law of the land." Here is an entirely new element—knowledge that he was acting contrary to the law of the land; and hereupon the inquiry arises, Is a man, acting under a delusion of this sort, presumed to know the law of the land? The answer must be, Yes; for the judges say, further on: "The law is administered

upon the principle that every one must be taken conclusively to know the law of the land, without proof that he does know it."

Let this proposition be examined a moment. Knowledge that the act was contrary to the law of the land is here given as a test; that is, such knowledge is assumed to be the measure of mental capacity sufficient to entertain a criminal intent. By what possible means, it may be asked, can that test or measure be applied, without first finding out whether the prisoner, in fact, knew what the law of the land was? How could a jury say whether a man knew, or did not know, that an act was contrary to the law of the land, without first ascertaining whether he knew what that law was?

It was like saying that knowledge of some fact in science—as, for example, that a certain quantity of arsenic taken into the stomach will produce death—shall be the test, and at the same time saying that it makes no difference whether the prisoner ever heard of arsenic, or knows anything of its properties or not. Knowledge that the act is contrary to law might be taken as a measure of capacity to commit crime, and so might knowledge of any other specific thing that should be settled upon for that purpose; and such a test would be consistent and comprehensible, whether it were right or not; but when it is said that knowledge of a certain thing is the test, and then we are told in the next paragraph that it makes no difference whether the man ever heard of the thing or not, I confess that I am not able to see any opening for escape out of the maze into which we are led. Whether a jury would be more successful, must depend, I suppose, on their comparative intelligence.

* * *

MAULE, J., holds that the general test of capacity to know right from wrong in the abstract, is to be applied in the case supposed by the first question, the same as in any other phase of mental unsoundness.

In answer to the second and third questions, which relate to the terms in which the matter should be left to the jury, the judges say that "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong."

Suppose, now, an insane man does an act which he knows to be contrary to law, because from an insane delusion (if that term amounts to anything more than the single term insanity) he believes it to be right notwithstanding the law, that the law is wrong, or that the peculiar circumstances of the case make it right for him to disregard it in this instance: how are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and can not both stand. * * *

The answer to the fourth question introduces a doctrine which seems to me very remarkable, to say the least. The question was: "If a person, under an insane delusion as to existing facts, commits an offence, is he thereby excused?" To which the answer was as follows: "On the assumption that he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example: if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposed, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

The doctrine thus promulgated as law has found its way into the text books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not be crime. It is true, in words, the judges attempt to guard against a consequence so shocking, as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, "and is not in other respects insane." That is, if insanity produces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It may be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we

can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the motive to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule which can be safely applied in practice, that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted, is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which, if it were true, would not be law, but pure matter of fact. No such distinction ever can or ever will be drawn in practice; and the absurdity as well as inhumanity of the rule seems to me sufficiently apparent without further comment.

To form a correct estimate of the value of these answers, we have only to suppose that, at the end of a criminal trial where the defence is insanity, they be read to the jury for their guidance in determining the question with which they are charged. Tried by this practical test, it seems to me, they utterly fail; and the reason of the failure, as I think, is, that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.

* * * * *

It is entirely obvious that a court of law undertaking to lay down an abstract general proposition, which may be given to the jury in all cases, by which they are to determine whether the prisoner had capacity to entertain a criminal intent, stands in exactly the same position as that occupied by the English judges in attempting to answer the questions propounded to them by the House of Lords in this case; and whenever such an attempt is made, I think it must always be attended with failure, because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact.

* * * * *

At the trial where insanity is set up as a defence, two questions are presented: First. Had the prisoner a mental disease? Second. If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent? The first is so purely a question of fact, that no one would think of disputing it any sooner than he would dispute that it was a question of fact, whether a man has consumption or not. It is in settling the second that all the difficulty arises.

The instructions asked for in this case go upon the ground that this is a mixed question of law and fact; that where there is delusion there can be no criminal intent; and that, where there is capacity to know right from wrong in reference to the particular act, there is capacity to commit crime. It is true, the sixth request does not present the matter in just this form; but if knowledge of right and wrong, as to the act, is to be considered a legal test of criminal accountability, it must follow that those who have such knowledge are accountable, as well as that those who have it not are not accountable. And this court is now called on, as a court of law, to decide whether either of these tests shall be adopted in this state; and if so, which.

It would doubtless be convenient to adopt some such test. It would, to some extent, save the trouble of trying each case, as it arises, on its own special and peculiar facts; at any rate, it would narrow the range of investigation to a search for the facts constituting the test adopted. But in cases of this sort, the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury. Nor ought such a rule to be adopted upon the authority of cases, unless those cases show beyond a doubt not only its existence, but that it is founded in reason and fundamental truth. Expressions of even the most eminent judges must not be mistaken for the enunciation of a universal principle of law, when it appears that they were used in charging the jury upon the facts arising in a particular case.

The instructions given also imply that this is a mixed question of law and fact; that the only element of law which enters into it is, that no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt. Thus far all are agreed; and the doctrine rests upon principles of reason, humanity, and justice, too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject. No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible can not be law.

* * * * *

Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease, was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and must be met from whatever direction it may be ap-

proached. Enough has already been said as to the use of symptoms, phases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent. They are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity; if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it, and it was crime.

The instruction as to insane impulse seem to be quite correct, and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore crime.

These instructions have now been twice given to the jury in capital cases in this state—first, by Chief Justice Perley, in *State v. Pike*, and now again by Judge Doe, in the case before us. In *State v. Pike*, no exceptions were taken to this part of the charge, and the questions here raised were not before the whole court for judicial determination, although they were printed in the case as transferred, and no objection to their form is understood to have been made.

But a question was passed upon in that case, which, carried to its logical results, goes far toward settling most of the questions raised upon the instructions here. It was claimed that the defendant was irresponsible by reason of a species of insanity called dipsomania. The court instructed the jury that "whether there is such a mental disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury." These instructions were specially excepted to by the defendant, and were held correct. This would seem to be entirely inconsistent with the idea that either delusion or knowledge of right and wrong is, as matter of law, a test of criminal capacity; and would also seem to be about equivalent to holding, in general terms, that it was for the jury to say whether the killing was the product of mental disease, and return their verdict of "guilty," or "not guilty by reason of insanity," as they found that fact to be.

We should be slow to establish any doctrine on this important subject, which we could see would be likely to result in the escape of malefactors from punishment, or afford encouragement to a fictitious defence of insanity; and no considerations of convenience or ease in the administration of the law, as before observed, should be allowed to weigh at all against adhering to any doctrine or any course of practice that rests upon sound reason, or that appears to be necessary for the attainment of right results, whether such doctrine or practice is supported by uniform authority or not.

Still it is no objection to the course of the judges who tried this case, and who tried Pike's case, that it relieves the subject of some of its most formidable difficulties so far as the court is concerned, and at the same time furnishes at least one clear and explicit direction which the jury can understand.

No untried or doubtful theory is adopted. The instruction given was always law, and always must be law, while justice is administered upon principles at all consonant with the calls of civilization and humanity. The only objection is, that the court did not go further, and undertake to explore a region where all is doubt, uncertainty, and confusion upon the authorities, and where, upon principle, they had no right to go at all; that they did not undertake to lay down a rule where, if we could allow ourselves to investigate the fact, we should probably find there is and can be no rule, nor to enunciate as law a pure matter of fact which can only be absolutely known to the Almighty.

I may add, that it confirms me in the belief that we are right, or at least have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane as well as careful and long study of the phenomena of mental disease, are infinitely better qualified to judge in the matter than any court or lawyer can be. See Ray's *Med. Jurisp. Ins.*, 5th ed., § 44.

The satisfaction with which the charge to the jury in *State v. Pike* is understood to have been received by the most enlightened members of the medical profession, proves to my mind, not that we have thrown down old landmarks to adopt any theory based on a partial, imperfect, or visionary view of the subject, but that, in a matter where we must inevitably rely to a great extent upon the facts of science, we have consented to receive those facts as developed and ascertained by the researches and observations of our own day, instead of adhering blindly to dogmas which were accepted as facts of science and erroneously promulgated as principles of law fifty or a hundred years ago.

The last instruction that the defendant was to be acquitted on the ground of insanity unless the jury were satisfied beyond a reasonable doubt that the killing was not produced by mental disease, was in accordance with *State v. Bartlett*, 43 N. H. 224, and was correct.

Exceptions overruled.⁵

⁵ Accord: Holding that there is no legal test of insanity. *Parsons v. State*, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

OBORN v. STATE.

1910. SUPREME COURT OF WISCONSIN. 143 Wis. 249,
126 N. W. 737, 31 L. R. A. (N. S.) 966.

Error to review a judgment of the circuit court for Winnebago county. Geo. W. Burnell, circuit judge. Affirmed.

The plaintiff in error was informed against as having, on the 19th day of May, 1908, at the town of Amberg in Marinette county, Wisconsin, feloniously and with premeditated design, killed one Louis Tobaltz. Such proceedings were duly had that he was placed on trial on a plea of not guilty and a special plea of insanity. A verdict was duly rendered on the special issue in favor of the state. * * * On the insanity issue there was much evidence tending to show that the accused was afflicted with epilepsy, the claim being that it, and other derangements, had affected his mind so as to render him irresponsible for the homicide. * * * The trial resulted in a verdict of murder in the second degree. * * *

MARSHALL, J.⁶—* * * The court was requested, on behalf of the accused, to instruct the jury to the effect that though the accused at the time of the homicide has sufficient mental capacity to enable him to know and appreciate the wrong of his act, yet he was legally insane, if by impaired will power, resulting from an abnormal condition, he was unable to resist the impulse to do the deed. That was refused. It was, as claimed, good law according to some authorities, particularly *Plake v. State*, 121 Ind. 433, 23 N. E. 273. It is condemned, however, by numerous decisions in this state, notably *State v. Wilner*, 40 Wis. 304; *Bennett v. State*, 57 Wis. 69, 14 N. W. 912; *Butler v. State*, 102 Wis. 364, 366, 78 N. W. 590; *Eckert v. State*, 114 Wis. 160, 163, 89 N. W. 826; *Lowe v. State*, 118 Wis. 641, 660, 96 N. W. 417; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593, though it must be admitted that in one of them, at least, language was used approving some such idea as at least not harmful error because of its liberality to the accused. The test declared in those cases is the well-known knowledge of right and wrong test.

The term "insanity," as used in the special plea in a criminal case, means such abnormal mental condition, from any cause, as to render the accused at the time of committing the alleged criminal act, incapable of distinguishing between right and wrong and so unconscious at the time of the nature of the act which he is committing, and that the commission of it will subject him to punishment. * * *

⁶ The statement of facts is condensed, and part of the opinion is omitted.

That there is a wide distinction between the two rules seems plain. The so-called most liberal rule recognizes existence of legal insanity notwithstanding capability to distinguish between right and wrong and consciousness of the wrongfulness of the particular act. The other does not. This court in *Eckert v. State*, *supra*, clearly reaffirmed the latter to be the correct rule. That is unmistakable because the court referred to the language of Chief Justice Shaw in *Commonwealth v. Rogers*, 7 Metc. 500, as having become the reliable classic on the subject and incorporated into the text-books so as to be recognized, generally, as elementary. The following is the language:

"A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing—a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment—such partial insanity is not enough to exempt him from responsibility for criminal acts." * * *

This court is not committed to the doctrine that one can successfully claim immunity from punishment for his wrongful act, consciously committed with consciousness of its wrongful character, upon the ground that, through an abnormal mental condition, he did the act under an uncontrollable impulse rendering him legally insane. One, at his peril of punishment, commits an act while capable of distinguishing between right and wrong, and conscious of the nature of his act. He is legally bound, in such circumstances, to exercise such self-control as to preclude his escaping altogether from the consequences of his act on the plea of insanity, though his condition may affect the grade of the offense. Thus far the charity of the law goes and no farther. * * *

Many foreign judicial illustrations might be given supporting the foregoing stated doctrine of this court. It is in harmony with the common law as indicated by a multitude of English decisions and all text-books. It is denominated, for brevity, by some of the latter as the "right and wrong test." * * *

In New York the same doctrine was adopted (*Willis v. People*, 32 N. Y. 715), though there were many attempts to engraft onto

it modifications in accordance with the views of medical experts. In *Freeman v. People*, 4 Denio 9, and *Flanagan v. People*, 52 N. Y. 467, a like effort was made. It was answered by reaffirming the doctrine announced by *Tindal, C. J.*, in *McNaghton's Case*, 10 Cl. & F. 200, as of the highest authority and the sound rule. Contrary medical and scientific authority was emphatically rejected. The matter was regarded of sufficient importance to warrant special treatment by Justice Andrews, resulting in its being held that "capacity of the defendant to distinguish between right and wrong at the time the act was done" was the only safe test; that he who is capable of knowing one from the other is bound, in law, to choose the right one regardless of the notions of some as to moral insanity or irresistible impulse. It was said that "the vagueness and uncertainty of the inquiry which would be opened and the manifest danger of introducing the limitations claimed into the rule of responsibility, in cases of crime may well cause courts to pause before assenting to it."

Notwithstanding the emphatic adoption by the New York court of the capacity to distinguish between right and wrong test, as indicated, the pressure by eminent alienists to engraft onto it the irresistible impulse element, and others, was such that the legislature, evidently intending to guard the jurisprudence of the state from falling into confusion, or the safe rule from being departed from to the impairment of the safety of human life, incorporated it into written law. *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275. The court there said that the eminent alienists who were disposed to criticise the rule and claim that a person should be held legally insane when by reason of an abnormal mental condition he acts under an irresistible impulse, should address themselves to the law-making power; that as the matter stood, knowledge of the nature and quality of the act that a person is doing and that it is wrong, renders him legally sane. We should say, in passing, that the written law remains the same in New York as it was at the time of such suggestion in 1893.

This lengthy discussion of the subject of legal insanity seems warranted because of the evident misconception of what was held in *Butler v. State*, *supra*. We should further say in passing that the learned court, though having refused the requested instruction, gave others requested, going nearly as far as the one rejected and more liberal to the accused than the right rule demanded. * * *

The judgment must be affirmed.⁷

⁷ In accord are the following cases holding that irresistible impulse is not a defense where knowledge of right and wrong exists: *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. Berry*, 179 Mo. 377, 78 S. W. 611; *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *Mackin v. State*, 59 N. J. L. 495, 36 Atl. 1040; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *Davis v. State*, 44 Fla. 32, 32 So. 822; *State v. Scott*, 41 Minn. 365, 43 N. W.

PETTIGREW v. STATE.

1882. COURT OF APPEALS OF TEXAS. 12 Tex. App. 225.

Appeal from the District Court of Bell. Tried below before Hon. B. W. Rimes. The case is clearly stated in the opinion.

WILLSON, J.—The defendant was indicted for the theft of a mare, and was convicted, and his punishment assessed at confinement in the penitentiary for five years.

The evidence to support the charge is substantially as follows: The mare was the property of J. N. Rape. She was stolen from him in Hill county on the 4th day of September, 1881. A few days after the mare was stolen in Hill county, the defendant had the mare at his father's house in Bell county. The defendant had been absent from his father's about two years, but it does not appear where he had been during the two years. No other facts were proved connecting the defendant with the theft of the mare. The fact of possession stands alone, to support the conviction.

On the part of the defendant it was proved that he was about 21 years of age; that he was very weak-minded, had scarcely any mind at all in some things, and was particularly deficient in memory and reason; that he could not count one hundred and could not learn to count, and could never learn anything at school. Several witnesses who had known him from childhood testified that in their opinion he did not have as much intellect or mind as a child ten or twelve years old, and not enough to know right from wrong; that he has always been regarded in the community in which he lived as a fool, and not responsible for his acts, on account of his want of mind.

We think the evidence insufficient to support the verdict, and that the court below should have set it aside and granted the defendant a new trial. We are also of opinion that the evidence establishes such a deficiency of intellect as renders the defendant irresponsible for crime. (Thomas v. State, 40 Texas 60; Webb v. State, 5 Texas Ct. App. 596; Williams v. State, 7 Texas Ct. App. 163.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

62; Wright v. People, 4 Neb. 407; State v. Knight, 95 Maine 467, 50 Atl. 276, 55 L. R. A. 373; Spencer v. State, 69 Md. 28, 13 Atl. 809; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; State v. Leveille, 34 S. Car. 120, 13 S. E. 319, 27 Am. St. 799; State v. Potts, 100 N. Car. 457, 6 S. E. 657; State v. Lyons, 113 La. 959, 37 So. 890. Contra, Green v. State, 64 Ark. 523, 43 S. W. 973; State v. McGruder, 125 Iowa 741, 101 N. W. 646; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. 408; Blackburn v. State, 23 Ohio St. 146; Commonwealth v. Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. 625; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, Dejarnette v. Commonwealth, 75 Va. 867; Allams v. State, 123 Ga. 500, 51 S. E. 506.

LOWE v. STATE.

1902. COURT OF CRIMINAL APPEALS, TEXAS. 44 Tex. Cr. 224,
70 S. W. 206.

Appeal from the District Court of Jackson. Tried below before Hon. Wells Thompson. Appeal from a conviction of horse theft; penalty, five years imprisonment in the penitentiary.

Dr. C. B. Phillips testified: "I have been a practicing physician for about forty-five years. I am a general practitioner and am not an expert in mental diseases, but in my practice have had some experience in treating such diseases. I have known defendant, Alfred Lowe, since 1873. He is about 40 years old. He is a moral degenerate and in my opinion a dipsomaniac and a kleptomaniac. I base my opinion professionally on what I know and also on what I have heard of his doing. He would always take things that did not belong to him. On a number of occasions I have known his brother to return to the owner stolen property. He will promise to pay you and never have any idea of doing it. I do not believe he knows right from wrong. I believe if you were to turn him loose to-night he would steal every horse in town if he had the chance and have no idea he had done anything wrong. I have treated him a number of times for diseases growing out of the excessive use of alcohol. He is what is called a dipsomaniac. Knowing defendant as I do, I would not consider him sane. I consider him insane. He has no lucid intervals. Since I have known him I have never known any good of him. All I know or have heard is bad. I will say he is a moral degenerate, a dipsomaniac and a kleptomaniac."

George Pridgen testified: "I know the defendant. We were boys together. My brother married his sister. I am no physician and know nothing of diseases of the mind. I have always regarded defendant morally irresponsible. He seems to be unable to keep from stealing and drinking. I knew him on one occasion to ride to town, take my brother's horse, and ride him home, leaving his own tied to the rack. From what I know of defendant it is my opinion that he is not responsible for his acts and has never been."

HENDERSON, J.—Appellant was convicted of the theft of a horse, and his punishment assessed at confinement in the state penitentiary for a term of five years.

The only question presented for our consideration is the action of the court failing and refusing to give a charge on kleptomania; that is a charge specially defining this species of insanity. It is conceded that the court gave a sufficient charge on insanity generally, but that kleptomania is a monomania or particular kind of insanity

which should have been specially defined to the jury. In this connection we understand appellant to agree that the right and wrong test is applicable to kleptomania; that is, the disease of insanity must be such as to have deprived appellant at the time of the capacity to distinguish between the right and wrong of the particular act charged, which was theft. If this be conceded, then it would seem to our comprehension that the charge of the court is sufficient, because it lays down the "right and wrong" test as to the particular act charged, and distinctly told the jury, if at the time appellant was so diseased as not to know it was wrong to commit theft, to acquit him. However, we do not understand the definition of "kleptomania" to be as conceded by appellant's counsel. The authorities define "kleptomania" as a species of mania, consisting of an irresistible impulse to steal. See 1 Cleavenger, *Insan.*, p. 177; 1 Bish. *Crim. Law*, § 388, subdiv. 3. Some of the books, however, regard it as a morbid propensity to steal, whether consciously or unconsciously. If kleptomania is simply an irresistible impulse to steal, regardless of the right and wrong test, then notwithstanding it was formerly recognized as a defense in theft by the courts of this State (see *Looney v. State*, 10 Texas *Crim. App.* 520, 38 Am. Rep. 646; *Harris v. State*, 18 Texas *Crim. App.* 287), that doctrine has more recently been repudiated. *Hurst v. State*, 40 Texas *Crim. Rep.* 378; *Cannon v. State*, 41 Texas *Crim. Rep.* 467. The writer dissented from the views of the majority of the court in those cases, but such is now the law of this state. So we hold, if the right and wrong test is applicable to kleptomania, the court gave a sufficient charge on the subject. If kleptomania is merely an irresistible impulse to steal, as the authorities seem to indicate, then it is not the law in this state, and the court was not required to give a special charge on that subject.

No error appearing in the record, the judgment is affirmed.
Affirmed.⁸

Section 2.—Intoxicated Persons.

"And he, who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober." 1 Hawkins *P. C.*, ch. 1, § 6.

⁸ See also, *State v. McCullough*, 114 Iowa 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. 382; *People v. Sprague*, 2 Park Cr. (N. Y.) 43.

O'HERRIN v. STATE.

1860. SUPREME COURT OF INDIANA. 14 Ind. 420.

APPEAL from the Wabash circuit court.

PERKINS, J.⁹—Indictment for larceny. Conviction, and sentence to the state prison.

Evidence was given upon the trial, tending to show that the appellant was intoxicated when he committed the alleged larceny. His counsel contend that intoxication would, in all otherwise criminal acts, rebut the presumption of criminal intent, and should work the acquittal of the defendant.

But in crimes, other than certain grades of homicide, "it is a settled principle that [voluntary] drunkenness is not an excuse for a criminal act committed while the intoxication lasts, and being its immediate result." 3 Greenl. Ev., § 148. But see 3 Shars. Blacks., p. 26, note. Such drunkenness is, in itself, a wrongful act, for the immediate consequences of which the law will hold the party liable. And although there may be no actual criminal intent, the law may hold the party, by construction, guilty of such intent. Lew. U. S. Crim. Law, 405.

The court below instructed the jury correctly on this branch of the case. * * *

We see no error in the case, and the judgment in it must be affirmed with costs.

Per Curiam—The judgment is affirmed with costs.¹⁰

STATE v. TATRO.

1878. SUPREME COURT OF VERMONT. 50 Vt. 483.

Indictment for the murder of Alice Butler on the evening of June 2, 1876. Trial by jury, April term, 1877, Royce, J., presiding.

At about seven o'clock in the evening of the day of the alleged murder, Charles Butler, the husband of the murdered woman, left his house to go to a neighboring village, leaving behind the respondent, who was then at work for him, as he had been at intervals for two or three years before that time. On entering his house on his return at about nine o'clock, he found the dead body of his wife

⁹ Part of the opinion is omitted.

¹⁰ Some old decisions, no longer law, hold that voluntary intoxication is an aggravation of the crime. *Beverley's Case*, 4 Coke 123b, 125a, 4 Black. Com. 25; *State v. Thompson*, *Wright* (Ohio) 617.

lying on the floor, with marks of blows from some heavy instrument on the head. * * *

The evidence on the part of the respondent tended to show that at the time of the alleged murder, the respondent was laboring under delirium tremens, acute mania, or some form of delirium resulting from excessive use of alcoholic drink, whereby he was rendered incapable of premeditating, or forming a design; and expert testimony was introduced as to the nature and effects of delirium tremens. * * *

The respondent requested the court to charge that if at the time of the commission of the act in question, the respondent was so far under the influence of intoxicating liquor as to be in a condition bordering on delirium tremens, and was unable to premeditate or form a design, malice could not be implied from the use of the deadly weapon with which the act was committed; that if he was so intoxicated as to be possessed of a mania, and was unable to deliberate or form an intent, then the act would be excusable homicide, or manslaughter at the most. * * *

The court charged that under the act of 1869, all murder premeditated by means of poison or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, &c., should be deemed murder in the first degree, and charged appropriately as to what under that act constituted other degrees of murder. The court also charged that an insane person was not punishable for his criminal acts; that insanity consisted in the incapacity to distinguish between right and wrong as to the act charged, and that in the eye of the law a person in the paroxysms of delirium tremens was insane. The court then called attention to the expert testimony upon the subject of that disease. Upon the question of intoxication as an excuse, the court charged as follows:

"The voluntary intoxication of one who without provocation commits a homicide, although amounting to a frenzy, that is, although the intoxication amounts to a frenzy, does not excuse him from the same construction of his conduct, and the same legal inferences upon the question of premeditation and intent, as affecting the grade of his crime, which are applicable to a person entirely sober. * * * I don't want to be misunderstood about this, and shall therefore repeat what I consider to be the law upon this point, that is, that if a party gets so intoxicated that he is crazy drunk, that it amounts to a frenzy, so that he does not know what he is doing, and if in such condition he should commit a crime, which, if committed by a sober man would be murder, it is equally murder in the man that is thus drunk." * * *

To the refusal to charge as requested, and to the charge given, the respondent excepted. Verdict, guilty of murder in the first degree.

REDFIELD, J.¹¹—* * * The court charged the jury that voluntary intoxication could neither excuse nor mitigate the offence. There is, perhaps, no principle or maxim of the common law of England more uniformly adhered to than that voluntary drunkenness does not excuse or palliate crime. Lord Coke, in his Institutes, declares that "whatever hurt or ill he doeth, his drunkenness doth aggravate it." 3 Thomas' Coke Lit. 46. And in his reports, *Beverly's Case*, 4 Coke 123b, 125, he says: "Although he that is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act, or offence, nor turn to his avail." And Sir Matthew Hale, eminent alike for his humanity and learning, says of drunkenness, which he calls *dementia affectata*: "This vice doth deprive men of the use of reason, and puts many men in a perfect but temporary frenzy; * * * but by the laws of England, such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." And Lord Bacon, in his "Maxims of the Law" (Rule 5), in that comprehensive language which clearly defines and gives the reasons for the rule of law, thus asserts the doctrine: "If a madman commit a felony, he shall not lose his life for it, because his infirmity came by act of God; but if a drunken man commit a felony, he shall not be excused, because the imperfection came by his own default." In *Burrow's case*, Lewin 75, A. D. 1823, Holroyd, J., thus defines the rule: "It is a maxim in the law that if a man gets himself intoxicated he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong." And the cases of *Rex v. Green* and *Rex v. Menkin*, 7 C. & P. 297, show the uniformity of this rule in the courts of England. In the case of *The People v. Rogers*, 18 N. Y. 9, the Supreme Court had reversed the conviction of Rogers on the ground that the court had excluded the evidence of the respondent's drunkenness, as affecting the criminal intent. But the case was, by writ of error, carried to the Court of Appeals, and the whole law upon that subject was reviewed and canvassed with great learning and ability by Chief Justice Denio and Harris, J. Harris, J., says: "The Supreme Court seem to have understood that in all cases where without it the law would impute to the act a criminal intent, drunkenness may be available to disprove such intent. I am not aware that such a doctrine has before been asserted. It is certainly not sound. The adjudications upon the subject, both in England and this country, are numerous and characterized by a singular uniformity of language and doctrine. They all agree that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated can not be allowed to

¹¹ Part of the statement of facts and of the opinion is omitted.

affect the legal character of the crime." But it is insisted that under the statute which makes "degrees" of murder, drunkenness qualifies and mitigates the higher offence. The statute declares that "all murder which shall be perpetrated by means of poison, or by lying in wait, or any other kind of deliberate and premeditated killing, * * * shall be deemed murder in the first degree." The same or similar statute has been enacted in most of the states. And many courts have allowed drunkenness to be shown in mitigation of the higher offence. In the case of *State v. Jackson*, 40 Conn. 136, the court held that intoxication, as tending to show that the prisoner was incapable of deliberation, might be given in evidence. Chief Justice Seymour dissented, and Foster, J., who tried the case below, did not sit, so that the four judges constituting the court were, in fact, equally divided. The same case came before that court again in 41 Conn. 584, and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation, and declared that "we have enunciated no such doctrine," but "held on a trial for murder in first degree, which under our statute requires actual express malice, the jury might and should take into consideration the fact of intoxication, as tending to show that such malice did not exist." And, in the same opinion, the judge says: "Malice may be implied from the circumstances of the homicide. If a drunken man take the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice. Intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be implied. We wish, therefore, to reiterate the doctrine emphatically, that drunkenness is no excuse for crime; and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil-disposed persons, will receive the sanction of this court." This reasoning seems to us both illogical and incongruous. To constitute murder of the first degree, the act must, indeed, be done with malice forethought. And that malice must be actual, not constructive. At common law, if the accused shoot his neighbor's fowls, and by accident kill the owner, he is guilty of murder, yet he did not intend to murder but to steal. Such cases are excluded by the statute from the definition of murder in the first degree. But "where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural and

probable effect of any act deliberately done was intended by its actor." 2 Am. Crim. Law, 944. "And intent for an instant before the blow, is sufficient to constitute malice." *Ib.* 948. It will be admitted that if the respondent had killed his victim "by poison, or lying in wait," the act would have been murder in the first degree, and the fact that he was intoxicated could not have been admitted to excuse or palliate the crime. Yet it is claimed that if the circumstances show that the murder was deliberately planned, and executed with fiendish barbarity and malice, drunkenness may come in to palliate the crime.

This, we think, is making a distinction without a difference. Chief Justice Hornblower, 1 Am. Crim. Law, § 1103, speaking of the New Jersey statute, which is like ours, says: "This statute, in my opinion, does not alter the law of murder in the least respect. What was murder before its passage is murder now—what is murder now was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases; or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and in all other kinds of murder the convict shall be punished by imprisonment."

The evidence, so far as detailed in this case, if believed, shows a murder most fiendish and shocking. He destroyed the last resisting vitality of this woman, struggling for her life, with an axe, which shows malice and malignity of purpose. The language of Chief Justice McKay, while discussing a like statute in Pennsylvania, and in a case quite similar to this, is fitting and sensible. He says: "It has been objected that the amendment of our penal code renders premeditation an indisputable ingredient to constitute murder in the first degree. But still it must be allowed that the intention remains, as much as ever, the true criterion of crime, in law as well as in ethics; and the intention of the party can only be collected from his words and actions. * * * But let it be supposed that a man without uttering a word should strike another on the head with an axe, it must on every principle by which we can judge of human actions, be deemed a premeditated violence." The statute has in no degree altered the common-law definition of murder. But the killing a human being by poison, or lying in wait, or by purposely using a deadly weapon to that end, is murder in the first degree; and the purpose and intent to kill must be determined by the circumstances that surround each case; for the murderer takes with him no witnesses, and does not often avow his purpose.

Where the requisite proof is adduced to show a wicked, intentional murder, he is not permitted to show a voluntary and temporary intoxication in extenuation of his crime.

The respondent takes nothing by his exceptions.¹²

¹² See the footnote at the end of the opinion *supra*, showing that the

RYAN v. UNITED STATES.

1905. COURT OF APPEALS OF DISTRICT OF COLUMBIA.
26 App. D. C. 74, 6 Ann. Cas. 633.

From the opinion of SHEPARD, C. J.

That voluntary intoxication neither excuses nor palliates crime is a settled principle in this jurisdiction. *Harris v. United States*, 8 App. D. C. 20, 26; 36 L. R. A. 465; *Landkton v. United States*, 18 App. D. C. 348, 370. In each of those cases the indictment was for murder. In such cases specific intent is not always necessary as in some other offenses; it is usually inferred from the act itself. But, where murder has, by statute, been made to consist of several degrees, the precise state of the mind of the accused may become of special importance. In such cases it may sometimes be a material question for the consideration of the jury whether, by reason of intoxication, the accused was, at the time, in such a condition of mind as to be capable of deliberate premeditation. *Hopt v. Utah*, 104 U. S. 631, 634, 26 L. ed. 873, 874.

In cases of larceny the specific intent to deprive the owner of his property is a necessary ingredient of the crime. The trespass or unlawful taking, for which a civil action would lie, is not sufficient; it must be coupled with the intent to steal. The question of the intoxication of the accused at the time of the unlawful taking may, therefore, sometimes become an important matter of consideration in ascertaining whether it was done with that intent. That the accused may have been drunk, in the ordinary sense of that word, is not sufficient. He must have been so drunk as to be incapable of forming the intent to steal; that is to say, incapable of consciousness that he is committing a crime—incapable of discriminating between right and wrong. *Thomas v. State*, 92 Ala. 49, 9 So. 540; *Bartholomew v. People*, 104 Ill. 601, 606, 44 Am. Rep. 97; *Wright v. State*, 37 Tex. Crim. Rep. 627, 633, 40 S. W. 491. See many cases

trend of modern authorities is opposed to this decision, and that intoxication may be considered as bearing on the defendant's intent, and especially to rebut the existence of malice and premeditation in trials for murder. See also, *Rex v. Meade*, 1 K. B. 895 (1909), in which the following charge to the jury was held not to be error. "In the first place everyone is presumed to know the consequences of his acts. If he be insane that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter."

cited on the brief for the appellant. See also Underhill, *Crim. Ev.*, § 166; 1 Bishop, *New Crim. Law*, § 411; 12 *Cyc. Law & Proc.*, p. 172.

Without reviewing the many cases in which the question has been considered, we concur with the conclusion stated by Mr. Bishop as follows: "A mere intentional trespass to another's goods does not constitute it [larceny], but the specific intent to steal must be added. So that if one, without the intent to steal becomes too drunk to entertain it, then, in this condition, takes another's goods, and relinquishes them before the intent could arise, or returns them the instant his restored mind has cognizance of the possession of them, there is no larceny."

This embraces those cases, also, where the property may have been recovered, or the taker apprehended, before his return to consciousness with reasonable opportunity to act upon reflection.

In accordance with the views above expressed, we must hold that there was no error in excluding evidence offered to show that the accused was drunk, merely, without offering to show further that the intoxication was of the character above indicated.

RHODES v. STATE.

1912. COURT OF APPEALS OF ALABAMA. 3 Ala. App. 182,
57 So. 1021.

Appeal from Circuit Court, Henry county; M. Sollie, Judge.

Joe Rhodes was convicted of unlawfully selling intoxicants, and he appeals. Affirmed.

PELHAM, J.—While the proposition is presented in several ways, as by the court's rulings on the admissibility of evidence set up in one of the defendant's showings for an absent witness, and by differently worded written charges requested by the defendant, the only question presented for our consideration is whether voluntary drunkenness can be set up as a defense to the crime of selling liquor in violation of the prohibition laws.

The defendant was charged with having sold spirituous, vinous, or malt liquors contrary to law, and on the trial the state proved by a witness that the defendant sold him a quart of whiskey, for which he paid the defendant \$1.50. The defendant testified that he was drunk on the occasion testified to by the state's witness, and did not remember anything about it; that he had been drinking heavily prior to the time in question, and did not remember and would not say whether he sold the whiskey or not, as he had no recollection of what happened during the time he was drunk, and

did not even remember having seen the state's witness on the occasion testified to by him. The state's witness testified that the sale took place on a certain Sunday morning at the defendant's house, and that the defendant appeared to have been drinking. "He looked like he had drank two or three drinks." One of the written charges, requested by the defendant and refused by the court, directly presents the question, and is as follows: "(2) The presumption in this case is that the defendant is innocent until the state has proven beyond all reasonable doubt that he is guilty; and if the jury has a reasonable doubt, growing out of all the evidence, as to whether he was sufficiently sober to make a contract of sale of the whiskey, then the jury can not convict the defendant for the unlawful selling of whiskey."

It is a well settled general rule of law that voluntary drunkenness at the time of the commission of a crime is no defense. If a person through his voluntary act drinks to intoxication, and while in that condition commits an act which would be a crime were he sober, he is held legally responsible, unless his drunkenness had resulted in insanity,¹³ or rendered him incapable of entertaining the specific intent which is the essential ingredient of the crime. That is the established rule in this state, and that voluntary drunkenness as a defense has not been extended beyond the limitations expressed, is made irresistible by a consideration of a long line of decisions by the Supreme Court. (Here follows Alabama citations.)

Voluntary drunkenness is no defense to a prosecution for crime not requiring proof of specific intent as a necessary ingredient of the offense * * *. The offense for which the defendant was indicted and on trial did not involve specific intent as an essence of the crime or necessary ingredient of the charge, and as voluntary drunkenness or intoxication has never been recognized by our Supreme Court as an excuse, palliation, or defense for the commission of any crime, but only that it may sometimes operate to rebut the existence of malice, so as to reduce the grade of the homicide or other crime, or to negative the specific intent requisite to make out certain offenses, we are unwilling to extend the rule to a case where the offense, although requiring proof of a sale, which in a sense embraces proof of a contract, does not include proof of specific intent as an element of the offense.

The case cited by appellant (*Whitten v. State*, 115 Ala. 72, 22 So. 483), from which the refused charges were "substantially copied" is not inharmonious with the other authorities cited, or the general rule as stated by us, but, on the contrary, strictly in line with the other cases. The charge in *Whitten's Case*, supra, is

¹³ Settled insanity produced by habitual intoxication is a defence to crime to the same extent as insanity produced by other causes; see *State v. Potts*, 100 N. Car. 457, 6 S. E. 657; *State v. Kavanaugh*, 4 Pennewill (Del.) 131, 53 Atl. 335; *Beasley v. State*, 50 Ala. 149, 20 Am. Rep. 292.

limited to the sobriety of the defendant at the time of the alleged assault "to form the specific intent to ravish." The court in that case holds that the charge should have been given, because it was necessary in that case (assault with intent to ravish) to prove that the defendant entertained the specific intent charged. And the court say in the opinion in that case: "Mere drunkenness does not excuse or palliate the offense, but it may produce a state of mind which incapacitates the party from forming or entertaining a specific intent."

The rulings of the trial court in refusing to allow proof of the defendant's drunkenness as an excuse or defense to the charge of selling whiskey in violation of law, and in refusing written charges instructing the jury to acquit based on that defense, are free from error, and the case will be affirmed.

Affirmed.

Section 3.—Infants.

"And if it appear by the circumstances, that an infant under the age of discretion could distinguish between good and evil, as if one of the age of nine or ten years kill another, and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit, as much as if he were of full age. But in such a case the judges will in prudence respite the execution in order to get a pardon; and it is said, that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon."

1 Hawkins P. C., ch. 1, § 8.

HAMPTON v. STATE.

1911. COURT OF APPEALS OF ALABAMA. 1 Ala. App. 156,
55 So. 1018.

Appeal from Lauderdale Circuit Court.

Heard before Hon. C. P. Almon.

From a conviction of burglary Monroe Hampton appeals.
Affirmed.

PELHAM, J.¹⁴—The defendant was indicted for burglary, and objected to being put upon his trial on a certified copy of the indictment; it being shown to the court that the original indictment was lost, misplaced, or destroyed. The court properly directed the clerk

¹⁴ Part of the opinion is omitted.

to make a certified copy of the indictment, and there was no error committed in arraigning and trying the defendant on the copy thus made and certified—Code 1907, § 7158.

After the jury was impaneled and before evidence was offered on the trial, defendant's attorney made the suggestion to the court that the defendant was a minor under 14 years of age, and at the time the offense for which he was indicted was committed was under 12 years of age, and objected to the court proceeding with the trial on account of defendant's age.

The subtle distinctions as to "the dubious age of discretion and criminal liability" of infants, occasioning much confusion under the common law, finally crystallized into the rule dividing infancy into two periods, during the first of which, before the infant reaches 7 years of age, he is legally presumed to be incapable of committing a felonious crime; after attaining his seventh year, he is no longer legally presumed to be incapable of committing a crime, but becomes only *prima facie* incapable, and this presumption lessens as his years increase, until at 14 he becomes *prima facie* capable of committing crime. If the infant is of sufficient intelligence and discernment to comprehend the nature and consequence of his evil acts when between 7 and 14 years of age, he may be properly and legally convicted and punished, and the evidence in this case disclosed by the record is sufficient to remove the defendant from the operation of the rule allowing immunity from punishment for the commission of a felony, and to overcome the *prima facie* presumption of defendant's incapacity on account of his infancy. Defendant being between the ages of 7 and 14 years, when the presumption of not being capable of committing a felony may be overcome by evidence, and not under 7 years, when he can not have discretion and no evidence can be heard against the presumption of incapacity, and the *prima facie* presumption attaching in this case being shown by the record to have been repelled by satisfactory evidence of legal accountability, there was no error in the court's overruling defendant's objection to being put upon his trial.—*McCormack v. State*, 102 Ala. 156, 15 So. 438; *Martin v. State*, 90 Ala. 608, 8 So. 858, 24 Am. St. 844; *Godfrey v. State*, 31 Ala. 323, 70 Am. Dec. 494.

* * * * *

The evidence as to defendant's guilt was in conflict, and was a question for the determination of the jury, and the general charge in behalf of defendant was properly refused.

No reversible error appears in the record, and the judgment appealed from is affirmed.

Affirmed.¹⁵

¹⁵ Accord: *State v. Fisk*, 15 N. Dak. 589, 108 N. W. 485, 11 Ann. Cas. 1061; *Beason v. State*, 96 Miss. 105, 50 So. 488.

Section 4.—Married Women.

"A feme covert is so much favored in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company, or by coercion of her husband.

Neither shall she be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her.

But if she commit a theft of her own voluntary act, or by the bare command of her husband; or be guilty of treason, murder, or robbery, in company with, or by coercion of, her husband, she is punishable as much as if she were sole.

Also a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offense as to the government of the house, in which the wife has a principal share; and also such an offense as may generally be presumed to be managed by the intrigues of her sex."

1 Hawkins P. C., ch. 1, §§ 9-12.

STATE v. WILLIAMS.

1871. SUPREME COURT OF NORTH CAROLINA. 65 N. Car. 398.

This was an indictment for assault and battery tried before Moore, J., at Spring Term, 1871, of Edgecombe Court.

The husband of the feme defendant was jointly indicted with her for an assault and battery upon one Anna Davis. It was in evidence that the defendant and her husband committed a battery on the prosecutrix. The defendant's counsel asked the court to instruct the jury that the feme defendant was not guilty, as the offence had been committed with her husband, and in his presence.

The court declined so to charge, but instructed the jury that when a married woman in the presence of her husband, committed an offence against natural law, and with force and violence, the presumption of coercion did not arise. Defendant excepted. Verdict of guilty; judgment, and appeal.

RODMAN, J.—The liability of a wife for a crime committed in the presence of her husband, has been variously stated by respectable text writers. Blackstone, Book 1, p. 444, says, "and in some felonies, and some inferior offences committed by her (the wife) through constraint of her husband, the law excuses her; but this extends not to treason, or murder." The same writer in Book IV, says, "and she will be guilty in the same manner, of all those crimes which like

murder, are mala in se, and prohibited by the law of nature." 1 Russ. Cr. 16. Also in Archbold's Crim. Prac. and Plead., 6: "So if a wife commit an offence under felony, even in company with her husband, she is liable to punishment as if she were not married." For this is cited 1 Hawk. ch. 1, § 13, "and generally a feme covert shall answer as much as if she were sole, for any offence, not capital, against the common law or statute. And if it be of a nature that may be committed by her alone without the concurrence of her husband, she may be punished for it without her husband," &c.

It was upon a recollection of these authorities that His Honor below ruled in the case as he did.

Nevertheless, upon a fuller examination of the authorities, we are of opinion that he was in error.

It seems to be admitted by all the authorities, that if a wife commit any felony (with certain exceptions not material now to consider) in the presence of her husband, it shall be presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and she is, therefore, excused.

It is generally agreed that treason and murder are exceptions to this rule; and some add to these, manslaughter, robbery and perjury, although the last is not a felony.¹⁶ The most important (perhaps all) of the authorities will be found referred to in the notes to *Commonwealth v. Neal*, 10 Mass. 152, 1 Leading Criminal Cases 81; in the argument of the counsel for the prisoner in *Regina v. Cruse*, 2 Moody C. C. 53, and in 1 Bishop C. Law 452.

As has been seen, several eminent text writers confine the presumption to cases of felony. But the more recent cases, both English and American, extend it to misdemeanors as well; those cases excepted, which from their nature would seem more likely to be committed by women, such as keeping a bawdy house, etc.

The case above referred to of *Commonwealth v. Neal*, 10 Mass. 152, was an indictment against husband and wife for an assault and battery, and is therefore in point. Bishop, vol. 1, § 452, considers the rule applicable to all offences whatever, with certain exceptions, such as treason, murder, etc. There are many English cases in which it has been applied in indictments for receiving stolen goods.

¹⁶ There is no presumption of coercion by reason of the husband's presence in case of murder, treason, and possibly robbery; *Rex v. Knight*, 1 C. & P. 116, n.; *Reg. v. Cruse*, 8 C. & P. 541; *Bibb v. State*, 94 Ala. 31; *Miller v. State*, 25 Wis. 384; *People v. Wright*, 38 Mich. 744, 31 Am. Rep. 331 (robbery). The presumption arises only in case the husband is present; *Commonwealth v. Butler*, 1 Allen (Mass.) 4; and that the criminal act was done by the wife under the direction of the husband, who was absent, is no defense; *State v. Potter*, 42 Vt. 495. The presumption does not arise in the case of offenses in which women are supposed to engage especially; *Commonwealth v. Lewis*, 1 Metc. (Mass.) 151, and *Commonwealth v. Hopkins*, 133 Mass. 381, 43 Am. Rep. 527 (keeping a disorderly house).

Rex v. Archer, 1 Moody C. C. 143; Regina v. Barber, 4 Cox. C. C. 272. Rex v. Price, 8 C. and P. 19, was for a misdemeanor in uttering counterfeit coin; and so was Conolly's case, 1 Lewin C. C. 227

When our accustomed authorities differ as to a principle, it is always proper to look at its foundation in reason. Mr. Lewin in his note to Rex v. Hughes, 2 Lewin C. C. 225, says that the reason of the rule in cases of burglary and larceny, had been said to be, that the wife might not know whose the goods were that were taken. This reason he properly rejects as insufficient, and suggests that it was considered odious and unjust to inflict on the wife a severe punishment, when the husband could plead his clergy (which a woman could in no case do,) and thus escape with a slight one.

The reason would confine the principle to the clergyable felonies. It seems, however, more natural to suppose the principle to have been founded upon the fact, that in most cases the husband has actually an influence and authority over the wife, which the law sanctions, or at least recognizes. 1 Hawk., ch. 1 § 9; 1 Bishop C. L. 452. In that case the reason would apply to misdemeanor with at least as much force as to clergyable felonies. And this we think the true view.

It is also conceded by all the authorities, that the presumption may be rebutted by the circumstances appearing in evidence, and showing that in fact, the wife acted without constraint; or by the nature of the offence. But in this case no circumstance appears tending to rebut the presumption which the law raises; and the case was not put to the jury in that point of view.

There was error.

COMMONWEALTH v. DALEY.

1888. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
148 Mass. 11, 18 N. E. 579.

Two complaints for unlawfully selling intoxicating liquors to minors.

At the trial in the Superior Court, before Sherman, J., there was evidence tending to show that the alleged sales were made to the minors at about the same time, in the defendant's bar-room, which was a front room on the lower floor of a dwelling-house; that in the rear of the house was a kitchen, separated from the bar-room by an entry, out of which doors opposite each other led into the bar-room and the kitchen; that the defendant was a married woman, who lived with her husband in the dwelling-house; that at the time of the sales the husband was not in the bar-room, and was not seen

by either minor, but was at the time in the kitchen, one of the doors between it and the bar-room being closed.

The defendant requested the judge to instruct the jury: "1. If the defendant sold the intoxicating liquor in the presence of her husband, it is a presumption of law that she acted under the coercion and control of her husband. And this is a conclusive presumption, unless overthrown by affirmative evidence. 2. In order to establish that the sales were made in the presence of the husband, it is not necessary to show that the sales were made in his sight, or that he was in the room where they were made, but if he was on the premises and in the house it would be sufficient. 3. There is no evidence in the case sufficient to control the presumption that the defendant at the time she made the sales was acting under the coercion and control of her husband."

The judge declined so to instruct, and the defendant excepted to his refusal to rule as requested. The judge, among other things, gave the following instruction, to which no exception was taken: "If you should be satisfied beyond a reasonable doubt, from the evidence, that the defendant made the sale of intoxicating liquor as alleged in the presence of her husband, or while he was near enough to see, hear, or know that she was making such sales, then she is presumed to be acting under his coercion, and she is not liable, and must be acquitted. If the husband was away at the time, not in the house or upon the premises, then the presumption of coercion does not apply."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. ALLEN, J.—When a married woman is indicted for a crime, and it is contended in defense that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of such coercion from his presence at the time of the commission of the crime; this presumption, however, is not conclusive, and it may be rebutted. And in order to raise this presumption it is also established that the husband's presence need not be at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his immediate control or influence.

No exact rule applicable to all cases can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of particular cases. And where the wife did not act in the direct presence of her husband or under his eye, it must usually be left to the jury to determine incidentally whether his presence was sufficiently immediate or direct

to raise the presumption. But the ultimate question, after all, is whether she acted under his coercion or control, or of her own free will independently of any coercion or control by him; and this is to be determined in view of the presumption arising from his presence, and of the testimony or circumstances tending to rebut it, if any such exist. *Commonwealth v. Burk*, 11 Gray 437; *Commonwealth v. Gannon*, 97 Mass. 547; *Commonwealth v. Welch*, 97 Mass. 593; *Commonwealth v. Eagan*, 103 Mass. 71; *Commonwealth v. Munsey*, 112 Mass. 287; *Commonwealth v. Gormley*, 133 Mass. 580; *Commonwealth v. Flaherty*, 140 Mass. 454; *Commonwealth v. Hill*, 145 Mass. 305, 307.

Applying these rules to the defendant's requests for instructions in the present case, it is apparent that the second instruction requested could not properly be given, because it could not be said as matter of law that "if he was on the premises and in the house, it would be sufficient"; that is sufficient presence to raise the presumption of coercion. That would be for the jury to determine. The exceptions to the omission to give the first and third requests are not now pressed; and there was no exception to the instructions as given, except so far as involved in the omission to give those requested.

The defendant, however, now contends that the effect of the instructions given was to put upon the defendant the burden of satisfying the jury of the facts necessary to create the presumption of coercion beyond a reasonable doubt. But this point was not taken at the trial, and the use of the words "beyond a reasonable doubt" was apparently an inadvertence which did not harm the defendant. If attention had been called to the view now urged, the jury would no doubt have been told that those words applied solely to the burden resting upon the commonwealth to prove the sales. The instruction that, if the husband was near enough to see, hear, or know that she was making such sales, she was not liable, and must be acquitted, was too favorable for the defendant, as the presumption of coercion was merely a disputable one, and might not prevail in the minds of the jury, in view of the testimony and the circumstances of the case.

Exceptions overruled.

COMMONWEALTH v. FLAHERTY.

1886. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
140 Mass. 454, 5 N. E. 258.

HOLMES, J.—The complaint alleged the keeping of a common nuisance, namely, a tenement used for the illegal sale and illegal keeping of intoxicating liquors. The evidence was of three sales,

two in the presence of the defendant's husband, and a third when he was in the yard outside the kitchen where the sale was made. As to this last sale, the jury were instructed that "no presumption arises that sales made by the wife, when the husband is on the estate, or on the premises, not in her presence, are made under constraint of the husband, and the defendant would be liable for any such sale so made." We think that the jury must have understood this language as meaning that, if, at the moment of the sale, the husband was not immediately and visibly in presence of the wife, she would be liable for it, as matter of law, although he was on the premises. We also think, although perhaps this is less important, that the word "liable" must be taken to mean liable on this complaint, which was the point on which the jury were to be instructed, as otherwise there would seem to have been a mistrial.

Thus construed, the instructions went too far, and justice to the defendant requires that she should have a new trial, even if the actual meaning of the judge was correct. It is true that, if the wife acts in the absence of her husband, there is no presumption that she acts under his coercion. But if the husband is near enough for the wife to act under his immediate influence and control, though not in the same room, he is not absent, within the meaning of the law. *Commonwealth v. Burk*, 11 Gray 437, 438. This principle was restated and applied in a case where, if it appeared at all where the husband was, he was in the barn while the sales were made in the house. *Commonwealth v. Munsey*, 112 Mass. 287. That case was, if anything, stronger than the present. For there the wife was complained of as a common seller, whereas in the present case (for keeping a nuisance) the sales do not constitute the offence, but are only evidence of it (*Commonwealth v. Patterson*, 138 Mass. 498), and as the husband "was a cripple, generally at home, except that he could hop out," it is conceivable that his wife might be so far free from his influence as to be answerable for the sale, and yet not so independent as to be deemed to have acquired control of the place. See *Commonwealth v. Churchill*, 136 Mass. 148, 151. The ruling sustained in *Commonwealth v. Roberts*, 132 Mass. 267, concerned unlawful sales made by a woman while her husband was at sea, and while, therefore, his absence could not be disputed.

Exceptions sustained.¹⁷

¹⁷ For further definition of the word "presence," see *State v. Fertig*, 98 Iowa 139, 67 N. W. 87; *Commonwealth v. Munsey*, 112 Mass. 287; *State v. Shee*, 13 R. I. 535.

Section 5.—Corporations.

PEOPLE v. ROCHESTER RAILWAY AND LIGHT
COMPANY.

1909. COURT OF APPEALS OF NEW YORK. 195 N. Y. 102, 88 N. E. 22.

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 23, 1909, which affirmed a judgment of the Monroe County Court sustaining a demurrer to an indictment of the defendant for the crime of manslaughter in the second degree.

The facts, so far as material, are stated in the opinion.¹⁸

HISCOCK, J.—The respondent has been indicted for the crime of manslaughter in the second degree because, as alleged, it installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful and negligent manner that gases escaped and caused the death of an inmate.

The demurrer to the indictment has presented the question whether a corporation may be thus indicted for manslaughter, under § 193 of the Penal Code.

Before proceeding to the interpretation of this specific provision we shall consider very briefly the general question discussed by the parties whether a corporation is capable of committing in any form such a crime as that of manslaughter.

Of the correctness of the proposition urged in behalf of the People that it may do so, subject to various limitations, we entertain no doubt.

Some of the earlier writers on the common law held that a corporation could not commit a crime. Blackstone in his Commentaries, Book 1, page 476, stated: "A corporation can not commit treason or felony, or other crime, in its corporate capacity; though its members may, in their distinct individual capacities." And Lord Chief Justice Holt (Anonymous, 12 Modern 555) is said to have held that "a corporation is not indictable, but the particular members of it are." In modern times, however, the courts and text writers quite universally have reached an opposite conclusion. A corporation may be indicted either for nonfeasance or misfeasance, the obvious and general limitations upon this liability being in the former case that it shall be capable of doing the act for non-performance of which it is charged, and that in the second case the act for the performance of which it is charged shall not be one of which performance is clearly and totally beyond its authorized powers. (Bishop's New Criminal Law, §§ 421, 422.)

¹⁸ Arguments of counsel are omitted.

The instances in which it has been held that a corporation might be liable criminally simply because it did or did not perform some act, and where no element of intent was supposed to be involved, are so familiar that any extended reference to them is entirely unnecessary. The latest authority in this state upholding such liability is found in the case of *People v. Woodbury Dermatological Institute*, 192 N. Y. 455, where it was held that a corporation might be punished criminally for disobeying the statute providing that "any person not a registered physician who shall advertise to practice medicine, shall be guilty of misdemeanor." There was involved no question of intent, but simply disobedience of a statutory provision against doing certain acts.

At times courts have halted somewhat at the suggestion that a corporation could commit a crime whereof the element of intent was an essential ingredient. But this doctrine, again with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical.

Of course, it has been fully recognized that there are many crimes so involving personal, malicious intent and acts so ultra vires that a corporation manifestly could not commit them. (Wharton's Criminal Law [9th ed.], § 91; Morawetz on Private Corporations [2d ed.], § 732 et seq.) But a corporation, generally speaking, is liable in civil proceedings for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority, real or apparent, and it is but a step further in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf.

Only a few citations need be made of eminent authorities approving and illustrating this rule.

Mr. Bishop in his *New Criminal Law*, § 417, says: "But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations. * * * Some have stumbled on the seeming impossibility of the artificial and soulless being, called a corporation, having an evil mind or criminal intent. * * * But the author explained in another work that since a corporation acts by its officers and agents, their purposes, motives and intent are just as much those of the corporation as are the things done."

In *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, a corporation was held liable for a criminal contempt. In the course of the opinion it was said: "It is contended that a corporation can not be guilty of a criminal contempt although it may be fined for what is called a civil contempt. It is said that an intent can not be

imputed to a corporation in criminal proceedings. * * * We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil."

The most recent authority upon this subject is found in the decision of the Supreme Court of the United States in the case of *New York Central & Hudson River Railroad Company v. United States*, 212 U. S. 481, 492, 494. In that case the railroad company and one of its officials had been convicted of the payment of rebates to a shipper. On the argument of the appeal it was urged that inasmuch as no authority was shown by the board of directors or the stockholders for the criminal acts of the agents of the company in contracting for and giving rebates, such acts should not be lawfully charged against the corporation, or as expressed in the opinion. "That owing to the nature and character of its organization and the extent of its power and authority, a corporation can not commit a crime of the nature charged in this case." The court then said: "In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted * * * that at the time mentioned in the indictment the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried. * * * Thus the subject matter of making and fixing rates was within the scope of the authority and employment of the agents of the company whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises. It is true that there are some crimes, which in their nature can not be committed by corporations. But there is a large class of offences, * * * wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them."

Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and

make it criminally liable for various acts of misfeasance and non-feasance when resulting in death, and amongst which very probably might be included conduct in its substance similar to that here charged against the respondent. But this being so, the question still confronts us whether corporations have been so made liable for the crime of manslaughter as now expressly defined in the section alone relied on by the People, and this question we think must be decisively answered in the negative.

Section 179 of the Penal Code defines homicide as "the killing of one human being by the act, procurement or omission of another." We think that this final word "another" naturally and clearly means a second or additional member of the same kind or class alone referred to by the preceding words, namely, another human being, and that we should not interpret it as appellant asks us to, as meaning another "person," which might then include corporations. It seems to us that it would be a violent strain upon a criminal statute to construe this word as meaning an agency of some kind other than that already mentioned or referred to, and as bridging over a radical transition from human beings to corporations. Therefore we construe this definition of homicide as meaning the killing of one human being by another human being.

Section 180 says that "Homicide is either: 1. Murder; 2. Manslaughter," etc.; § 193 says that: "Such homicide," that is, "the killing of one human being * * * by another," is manslaughter in the second degree when committed "without a design to effect death. * * * 3. By any act, procurement or culpable negligence of any person, which * * * does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." Thus we have the underlying and fundamental definition of homicide as the killing of one human being by another human being, and out of this basic act thus defined and according to the circumstances which accompany it are established crimes of varying degree including that of manslaughter for which the respondent has been indicted. In the definition of these crimes as contained in the sections under consideration (§§ 183-193) we do not discover any evidence of an intent on the part of the legislature to abandon the limitation of its enactment to human beings or to include a corporation as a criminal. Many of these sections could not by any possibility apply to a corporation and in our opinion subdivision 3 of § 193 relating to manslaughter manifestly does not. It is true that the term "person" used therein may at times include corporations but that is not the case here. The surrounding and related sections are not calculated to induce the belief that it has any such meaning, and the classification of manslaughter as a form of homicide and the definition of homicide already quoted forbid it.

The judgment should be affirmed.

Cullen, Ch. J., Gray, Edward T. Bartlett, Werner, Willard Bartlett and Chase, JJ., concur.

Judgment affirmed.¹⁹

¹⁹ For recent decisions considering the criminal liability of corporations, see *Southern Railway Co. v. State*, 125 Ga. 287, 54 S. E. 160, 114 Am. St. 203; *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. 74; *State v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

CHAPTER VIII.

DEFENSES.

Section 1.—Self-Defense.

"And now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such an inevitable necessity.

And not only he who on an assault retreats to a wall, or some such straight, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable necessity; but also he who being assaulted in such a manner, and in such a place, that he can not go back without manifestly endangering his life, kills the other without retreating at all. * * *

According to some good opinions, even he who gives another the first blow on a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony; yet such a person seems to be too much favored by this opinion, inasmuch as the necessity to which he is at last reduced, was at the first so much owing to his own fault. And it is now agreed, that if a man strikes another upon malice prepense, and then fly to the wall, and there kill him in his own defense, he is guilty of murder."

1 Hawkins P. C., ch. 29, §§ 13, 14, and 17.

SHORTER v. PEOPLE.

1849. COURT OF APPEALS OF NEW YORK. 2 Comst. (N. Y.) 193.

Henry Shorter, a negro, was indicted for the murder of Stephen C. Brush, and tried at the Erie County Oyer and Terminer November, 1848. * * *

The evidence having closed, Justice Hoyt, presiding at the trial, proceeded to charge the jury at large upon the case, and having done

so, the counsel for the prisoner requested the court to charge that if the deceased struck the first blow, and if there was reasonable ground to apprehend a design on the part of the deceased to do the prisoner some great personal injury, and the prisoner believed that there was imminent danger of such design being accomplished, it was a case of justifiable homicide, although he might be mistaken in such belief; and that the question was not whether such danger existed, but whether the prisoner believed it to exist. The court refused so to charge, but on the contrary charged that to render the killing justifiable the jury should be satisfied that there was in fact imminent danger that the deceased would commit some great personal injury upon the prisoner. The prisoner's counsel excepted to this part of the charge and to the refusal to charge as requested. The jury found the prisoner guilty of murder. A bill of exceptions was made and the case removed by certiorari into the Supreme Court, where a new trial was refused. The prisoner brought error to this court.

BRONSON, J.¹—When one who without fault himself, is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I can not better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice Parker, of Massachusetts, on the trial of Thomas O. Selfridge. "A in the peaceable pursuit of his affairs sees B walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A who has a club in his hand, strikes B over the head, before, or at the instant the pistol is discharged; and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A." Upon this case the judge inquires, "Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those

¹ Part of the statement of facts and of the opinion, and arguments of counsel are omitted.

who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defense. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle." The judge had before instructed the jury, that "when from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." (Selfridge's Trial, p. 160; 1 Russ. on Crime, 699, ed. of '24; p. 485, note, ed. of '36.) To this doctrine I fully subscribe. A different rule would lay too heavy a burden upon poor humanity.

I have stated the case of Selfridge the more fully, because it is not only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question.

I shall not stop to consider the common-law distinction between justifiable and excusable homicide, because our statute has placed killing in self-defense under the head of justifiable homicide. (2 R. S. 660, § 3.)

The Massachusetts case lays down no new doctrine. The same principle was acted on in Levett's case, recited by Jones, J., in Cook's case (Cro. Car. 538), to the following effect. Levett was in bed with his wife, and asleep, in the night, when the servant ran to them, in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife espying some one whom she knew not in the buttery, cried out to her husband, in great fear, "here they be that would undo us." Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting with his rapier before him, killed Frances Freeman, who was lawfully in the house, and wholly without fault. On these facts, found by special verdict, the court held that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here, the defendant acted upon information and appearances which were wholly false, and yet, as he had reasonable grounds for believing them true, he was held guiltless.

* * * * *

Although I can not concur in the law of that part of the charge to which exception was taken on the trial, it does not necessarily follow that we must reverse the judgment. The evidence did not make a case for laying down the law of justifiable homicide; an error of the court concerning an abstract proposition having nothing to do with the matter in hand, is not a sufficient ground for reversing a judgment. If every controverted fact mentioned in the bill of ex-

ceptions is taken in favor of the prisoner, the best case which he can possibly make will be substantially as follows: There was a sudden combat between the parties in the night, in which the deceased gave the first blow; but the prisoner entered readily into the fight. The deceased had no weapon, and gave blows with his naked hands or fists, while the prisoner struck with a knife, inflicting not less than nine wounds, one or more of which were mortal. After several blows had passed, the deceased hallooed, "he has got a knife," and retreated towards the middle of the street. The prisoner followed, and continued to give blows; the deceased at the same time either giving blows or defending himself against those given by the prisoner. The prisoner did not leave the sidewalk. When the deceased got to the middle of the road, he cried out, "Oh boys," fell, and died in a few minutes. The prisoner did nothing to shun the combat, nor did he show any disposition to stop the fight after it had commenced. Although one witness thought the deceased had the best of the fight at first, no important advantage was gained over the prisoner: he was neither knocked down, nor seriously injured, nor was he in any danger of life or limb. He followed when the deceased tried to escape, still giving blows with a deadly weapon, until very near the moment when the deceased fell down and expired. This is the most favorable statement of the case for the prisoner which can be drawn from the facts detailed in the bill of exceptions; and much more favorable than any intelligent jury would draw from the whole of the evidence. But taking the case as I have stated it, there is no color for calling it justifiable homicide, or for leaving any such question to the jury. If it was not murder, it was manslaughter at the least; and so far as relates to these offences, no exception was taken to the charge. When a man is struck with the naked hand, and has no reason to apprehend a design to do him any great bodily harm, he must not return the blow with a dangerous weapon. After a conflict has commenced he must quit it, if he can do so in safety, before he kills his adversary;² and I hardly need add, that if his adversary try to escape, he must not pursue and give him fatal blows with a deadly weapon.

As there was no question of justifiable homicide in the case, the prisoner had no right to call on the court to instruct the jury on that subject; and although the instruction given was wrong in point of law, I do not see how it can possibly have operated to the prejudice of the prisoner. As this is a criminal and a capital case, I can not but feel a strong disposition to give the prisoner a new trial. But the law concerning bills of exceptions is the same in criminal as it is in civil cases (*The People v. Wiley*, 3 Hill (N. Y.) 194, 214) and we must not allow our feelings to draw us into the

² Accord: *People v. Johnson*, 139 N. Y. 358, 34 N. E. 920; *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am St. 557.

making of a bad precedent. I am of opinion that the judgment of the Supreme Court should be affirmed; and my brethren concur in this opinion, upon both the points which have been considered.

Judgment affirmed.

MILLER v. STATE.

1909. SUPREME COURT OF WISCONSIN. 139 Wis. 57, 119 N. W. 850.

Error to review a judgment of the Circuit Court for Taylor County: John K. Parish, circuit judge. Affirmed as to plaintiff in error Bromley; reversed as to plaintiff in error Miller.

The plaintiffs in error were, in due form, charged with the offense of murder in the first degree, in that they, on the 18th day of March, 1906, at the town of McKinley, in Taylor county, this state, feloniously assaulted Thomas McGowan with premeditated design to take his life and by such assault effected such design. Such proceedings were in due form had that they were found guilty by the verdict of a jury, and subsequently were in form sentenced as the law seemed to require. The facts as aforesaid are stated in the opinion.

MARSHALL, J.³—* * * Exceptions were taken both to a refusal to give a requested instruction and instruction given on the subject, of duty to retreat, avoiding necessity to take human life in self-defense, all of which may best be considered together.

The court instructed in these words:

"A person who is assaulted and his life put in danger by the assault, or if he is in danger of receiving great bodily harm from such assault, may take the life of his assailant, but should not do so when he can retreat in safety and thereby save his life or save himself from receiving great bodily harm, without taking the life of his assailant, but if a person is assaulted as aforesaid while in his house he would not be obliged to flee out of his house from such assailant."

Counsel for accused requested this to be given:

"If the defendant, Bromley, at the time the fatal shot was fired, had reasonable grounds to believe and in good faith believed that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, but was entitled to stand his ground and meet any attack made upon him or which he had reasonable ground to believe was being made upon him in such a way and with such force as under all the circumstances he at the moment honestly believed and had reasonable grounds to believe was neces-

³ Part of the opinion is omitted.

sary to save his own life or to protect himself from great bodily harm."

The request was modified and given as charged, the new element being expressed thus:

"This rule applies where a person is assaulted within his own house. The state claims that the alleged assault, if made at all, was made out of doors, immediately before the firing of the shot which killed the deceased, Thomas McGowan."

Those instructions, on the whole, were confusing, contradictory, and plainly erroneous. They offend against the long-established law of this state. The ancient doctrine requiring the party assaulted to "retreat to the wall," as it is laid down in Blackstone and the early common-law writers, the "flight" rule requiring such party, with some exceptions including defense within one's dwelling, to flee from the presence of danger as far as practicable in a physical sense, or so far that to go further would tend rather to increase than lessen the apparent danger, may have been all right in the days of chivalry, so called, but, by almost common consent of the moulders of the unwritten law, in later years, it is unadaptable to our modern development, and, therefore, has been pretty generally, and in this state very definitely, abandoned. It has been superseded by a doctrine in harmony with the divine right of self-defense; the doctrine that when one is where he has a right to be and does not create the danger by his own wrongful conduct, he may stand his ground, if assailed by another, and in case of his honestly and reasonably believing himself to be in imminent danger of losing his life or receiving some great bodily harm at the hands of such other, he may use such means as, presently to him, reasonably, seem necessary to avert the impending danger, even to taking the life of his assailant. The Supreme Court of the United States, in *Beard v. United States*, 158 U. S. 550, 15 Sup. Ct. 962, has laid down the law thus:

"In our opinion, the court below erred in holding that the accused, while on his premises, outside his dwelling-house, was under legal duty to get out of the way. * * * The defendant was where he had a right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under the circumstances, he, at the moment, honestly believed, and had reasonable cause to believe, was necessary to save his own life or to protect himself from great bodily injury."

It will be seen that the vice of the instruction which the federal court condemned is the very element the trial court, in this case, added to the request presented by counsel. The element of deadly weapon in the hands of the assailant, given some significance in the quoted language, bore only on the question of whether the assaulted had reasonable ground to apprehend the serious danger and necessity for doing as he did to avert it. The gist of the matter is that a person no longer need flee from danger of personal injury at the hand of another rather than strike him down to avert it, if that danger in honest, reasonable apprehension, is of the grade mentioned, and such striking is so apprehended to be necessary, and such danger is not produced by such person's wrong. The reasonable, honest apprehension is the key to the justification. If it turns out that there was no such danger in fact nor any such necessity, the justification, nevertheless, remains unimpaired.* * *

ALLEN v. UNITED STATES.

1896. SUPREME COURT OF UNITED STATES. 164 U. S. 492,
41 L. ed. 528, 17 Sup. Ct. 154.

MR. JUSTICE BROWN⁵ delivered the opinion of the court.

This was a writ of error to a judgment of the Circuit Court of the United States for the Western District of Arkansas sentencing the plaintiff in error to death for the murder of Philip Henson, a white man, in the Cherokee Nation of the Indian Territory. The defendant was tried and convicted in 1893, and, upon such conviction being set aside by this court, 150 U. S. 551, was again tried and convicted in 1894. The case was again reversed (157 U. S. 675), when Allen

⁴ Accord: *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52, in which Niblack, J., says at page 84: "A very brief examination of the American authorities make it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." See cases in accord, 21 Cyc. 822, n. 4.

⁵ Part of the opinion is omitted.

was tried for the third time and convicted, and this writ of error was sued out.

The facts are so fully set forth in the previous reports of the case that it is unnecessary to repeat them here. * * *

5. The ninth alleged error turned upon the statement made by the court of the circumstances under which the killing would be justifiable:

"It does not mean that defendant was assaulted in a slight way, or that you can kill a man for a slight attack. The law of self-defence is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act that is hurled against him, and that he has not created it, or created the necessity for it by his own wrongful, deadly, or dangerous conduct—conduct threatening life. It must be an act where he can not avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety."

It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril. *Wallace v. United States*, 162 U. S. 466.

Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard v. United States*, 158 U. S. 550. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of *Alberty v. United States*, 162 U. S. 499, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. * * *

For the reasons above stated the judgment of the court below will be

Affirmed.⁶

STATE v. DONNELLY.

1886. SUPREME COURT OF IOWA. 69 Iowa 705,
27 N. W. 369, 58 Am. Rep. 234.

THE defendant was indicted for the crime of murder in the first degree, and was found guilty of manslaughter, and sentenced to imprisonment for fifteen months. He appeals to this court.

ADAMS, C. J.⁷—1. The defendant shot his father, Patrick Donnelly, with a shot-gun, causing a wound of which he died about two days afterwards. The deceased had become angry with the defendant, and, at time of the firing of the fatal shot, was pursuing the defendant with a pitchfork, and the circumstances were such that we think that the jury might have believed that he intended to take the life of the defendant. On the other hand, the circumstances were such that we think that the jury might have believed that the defendant could have escaped, and fully protected himself by retreating, and that he had reasonable ground for so thinking.

The court gave an instruction in these words: "You are instructed that it is a general rule of the law that, where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch, before he is justified in repelling such assault in taking the life of his assailant. But cases frequently arise where the assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the party thus assaulted to retire without manifest danger to his life, or of great bodily injury; in such cases he is not required to retreat." The defendant assigns the giving of this instruction as error. He contends that the court misstated the law in holding, by implication, that he is excused from doing so only where it would manifestly be dangerous to attempt it. His position is that the assailed is under obligation to retreat only where the assault is not felonious, and that, where it is felonious, as the evidence tends to show in this case, he may stand his ground, and kill his assailant, whatever his means of retreat and escape might be, provided only he had reasonable cause for believing that if he stood his ground, and did not kill his assailant, his assailant would kill him, or

⁶ But see *Rowe v. United States*, 164 U. S. 546; 41 L. ed. 547.

⁷ Part of the opinion is omitted.

inflict a great bodily injury. Under this theory and the evidence, the jury might have found that the defendant was justified in killing his father, and that, too, even though there had been other evidence showing that his father was so old and decrepit that the defendant could have escaped him by simply walking away from him. It is perhaps not to be denied that the defendant's theory finds some support in text-books and decisions. But, in our opinion, it can not be approved. This court has, to be sure, held that a person assailed in his own house is not bound to retreat, though by doing so he might manifestly secure his safety. *State v. Middleham*, 62 Iowa 150. While there is some ground for contending that the rule does not fully accord with the sacredness which in later years is attached to human life, the course of decisions appeared to be such as not to justify a departure from it. The rule for which the defendant contends seems, so far as it finds support in the authorities, to be based upon the idea that, where a person attempts to commit a felony, it is justifiable to take the offender's life if that is the only way in which he can be prevented from consummating the felony attempted. But where a person is assailed by another who attempts to take his life, or inflict great bodily injury, and the assailed can manifestly secure safety by retreating, then it is not necessary to take the life of the assailant to prevent the consummation of the felony attempted. In *Roscoe Crim. Ev.* 768, note, the annotator says: "When a man expects to be attacked, the right to defend himself does not arise until he has done everything to avoid that necessity"; citing *People v. Sullivan*, 7 N. Y. 396; *Mitchell v. State*, 22 Ga. 211; *Lyon v. State*, 22 Ga. 399; *Cotton v. State*, 31 Miss. 504; *People v. Hurley*, 8 Cal. 390; *State v. Thompson*, 9 Iowa 188; *U. S. v. Mingo*, 2 Curt. (U. S.) 1. In our opinion, the court did not err in giving the instruction in question.

* * * * *

We have examined the entire case, and discover no error.
Affirmed.⁸

UNITED STATES v. OUTERBRIDGE.

1868. CIRCUIT COURT OF THE UNITED STATES.
5 Sawy. (U. S.) 620, 27 Fed. Cas. No. 15978.

BEFORE Mr. Justice Field, and Hoffman, District Judge.

The defendant was indicted and tried at the June term of 1868, for murder on the high seas.

⁸ Accord: *State v. Dyer*, 147 Iowa 217, 124 N. W. 629, and cases cited in 21 Cyc. 822, n. 3, holding that the defendant must retreat if he can safely although feloniously assaulted and without fault himself; see also 21 Cyc. 820, n. 98.

Mr. JUSTICE FIELD charged the jury as follows: * * *

The prisoner at the bar is indicted for the crime of murder. The indictment charges that the defendant did, on the first of April of the present year, on the high seas, on board of the American vessel Jenny Prince, belonging to citizens of the United States, feloniously, wilfully, and of malice aforethought, make an assault upon one William Anderson, then aboard of said vessel, and by a capstan bar, an instrument of wood, of four feet in length and six inches in circumference, inflict several mortal wounds upon his head and neck, of which he, on the same day, died. The charge here is of the murder of William Anderson, upon the high seas, on the 1st of April last.

* * * * *

In the present case there is no question as to the homicide charged, nor is there any question that the homicide was committed by the prisoner, nor is it denied that the blows which caused the homicide were intentionally given. The instrument used was of such magnitude and weight that it would, in all probability, have broken the skull, had it been applied with slight force, but the evidence shows that great force was used. There is no element in the case which can bring the homicide within the definition of manslaughter. There was here no sudden and violent passion produced by great provocation, which, for the moment, overpowered the reason of the prisoner. He does not rest his defense upon any such ground. His defense is that he was justified in taking the life of Anderson; that the homicide was required for the preservation of his own life.

Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any one, who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and can not be superseded by the law of society.

In the definition of justifiable homicide the following particulars, says Mr. Justice Washington, "are to be attended to. The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. No words, no questions however insulting and irritating, not even an assault, will afford such justification; although it may be sufficient to reduce the offense from murder to manslaughter. In the next place, the intent to commit a felony must be apparent, which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attend-

* Part of the charge is omitted.

ing circumstances, such as the manner of the assault, the nature of the weapons used, and the like. And, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used necessary to avert it." (*United States v. Wiltberger*, 3 Wash. C. C. 521.)

You will observe from this language that the intent to commit the felony must be apparent; that is, in the process of execution, so that the movement towards the execution becomes cognizable by the senses. For example, if a man declares that he will kill another, and moves towards him with a heavy weapon raised in the position to strike, or with a pistol cocked and directed towards him, the intent to commit a felony would be apparent, although in point of fact the party may never have intended to strike, or the pistol may have been unloaded. As observed by Mr. Justice Washington, this apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like.

You will observe from the language cited that the intent to commit a felony must not only be apparent, it must also appear that the danger was imminent, and the species of resistance used necessary to avert it. By imminent danger is meant immediate danger—one that must be instantly met; one that can not be guarded against by calling on the assistance of others or the protection of the law. And the species of resistance used, that is, the means to prevent the threatened injury, must be such as were necessary to avert it.

Tested by these rules, the defense utterly fails. We will not even presume to suggest that the threats of the deceased were the mere coarse vaporings of a brutal sailor, never intended to be carried out. We will assume that, at the time they were uttered, they were the expression of a determined purpose on the part of the deceased. There is no evidence of any subsequent attempt to carry them into execution; nor is there any evidence that there was not adequate means with the captain and the rest of the crew, for the protection of the defendant. The danger, if any ever existed, that the threats would be carried into effect, was not imminent. The deceased was at the time asleep, covered by a sail on the deck. If it had been reasonable to believe that on awakening he would have proceeded at once to the execution of his threat, even then the means to secure him and prevent him should have been resorted to. There was sufficient force on board to control him.

Mere threats against the person or life of another, without any attempt at execution, will not justify homicide, nor even when such attempt is made, unless the danger be so imminent as not to admit of any delay in meeting it on the part of the assailed. No other rule could exist with proper security to human life in society.

The case is in your hands. As already said, you are the exclusive

judges of the facts; that is to say, it is your exclusive province to pass on the evidence, and to give it such weight as you may judge it entitled to receive.

The jury found the defendant guilty of murder.

STATE v. DOHERTY.

1908. SUPREME COURT OF OREGON. 52 Ore. 591, 98 Pac. 152.

The defendant, Dan P. Doherty, was convicted of murder in the second degree, and from the judgment, sentencing him to the penitentiary for life, he appeals.

Affirmed.

Opinion by MR. CHIEF JUSTICE BEAN.¹⁰

* * * The right to take the life of another in self-defense is founded on necessity, real or apparent, and can only be resorted to when the circumstances are such as to warrant a reasonable belief in the party assaulted that the killing is necessary for the preservation of his life or to protect his person from great bodily harm. Wharton, Homicide, § 225.

And by "great bodily harm" is meant more than a mere injury by the fist, such as is likely to occur in ordinary assault and battery. The injury apprehended must be more severe and serious than that usually inflicted in an ordinary fight with the fist, without weapon. 4 Words and Phrases 3162; Wharton, Homicide, § 376.

According to the Supreme Court of the United States, the threatened injury must be one that would maim, or that would be permanent in its character, or that might produce death (*Acers v. United States*, 164 U. S. 388, 17 Sup. Ct. 91, 41 L. ed. 481), or, as stated by the Supreme Court of Alabama, it must involve imminent peril to life or limb (*Blackburn v. State*, 86 Ala. 595, 6 So. 96). Fear of a slight injury is not sufficient, nor will a mere assault, not felonious, furnish an excuse for the taking of life. If the intention of the assailant is only to commit a trespass or simple beating, it will not justify his killing. *Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760; *State v. Benham*, 23 Iowa 155, 92 Am. Dec. 416. But, considering the relative age and strength of the parties or the ferocity of the attack, if the intended beating is of such a character as to endanger life or limb, then it will be felonious, and the assaulted person is justified in taking the life of his assailant if necessary to preserve his own or protect him from such a beating. *State v. Gray*, 43 Ore. 446, 74 Pac. 927.

¹⁰ Part of the opinion is omitted.

Now there was no evidence in the case, as we read the record, to justify an apprehension that the deceased intended to do anything more than to inflict a slight injury upon the defendant. According to all the witnesses to the affray, except defendant, he did not strike him at all, at the time of the shooting, nor make any effort to do him serious injury. Defendant states that deceased knocked him down. This conflicts with all the other testimony in the case; but, giving to it full weight and credit, it shows nothing more than an ordinary affray, in which the deceased struck him, but with no intention of doing him any serious bodily harm. Deceased was not armed at the time, and did not follow up the assault, or attempt to continue the beating, but was in the act of retreating, when the fatal shots were fired. * * *

The judgment is affirmed.

PEOPLE v. FILIPPELLI.

1903. COURT OF APPEALS OF NEW YORK. 173 N. Y. 509,
66 N. E. 402.

Appeal from a judgment of the Court of General Sessions of the county of New York, rendered February 21, 1901, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

CULLEN, J.¹¹—The appellant was convicted of murder in the first degree in having killed one Michael Carrafiello on October 22, 1900, by stabbing him in the bowels with a knife. The facts of the case lie within a comparatively narrow compass. The deceased and the witness Decicco, on the day of the homicide, went from Bridgeport, Connecticut, where they were then residing, to the city of New York, and about two o'clock in the afternoon reached the apartment of an acquaintance, Bernardo Marotta, in First avenue near One Hundred and Fifteenth street. There they found Marotta, his wife and the appellant. While in this apartment the parties had some beer, and after a time Mrs. Marotta demanded from the deceased payment of some money which the latter owed to her. The deceased stated either that he was unable or unwilling to pay his debt. Some words ensued between them, when the defendant intervened in the dispute. There is a conflict in the evidence as to what thereupon took place. The defendant and Marotta and his wife testified that the deceased drew a revolver and threatened to shoot the defendant. Decicco, the companion of the deceased, testified that

¹¹ Arguments of counsel, and part of the opinion are omitted.

the defendant drew a revolver, and that the deceased had none. However this may be, it appears that no blows were struck, nor weapons used, and that Marotta took the defendant away and shut him up in an adjoining room. After a short while the deceased, Decicco and Marotta went together down into the street and remained for some time on the sidewalk. Here again witnesses disagree as to what took place. Marotta and his wife and their son, a boy about eleven years old, say that the deceased drew his revolver and threatened the defendant, who appeared at the window of the room above, and also sent by the boy a challenge to the defendant to come to the street, when he (the deceased) would "fix him like Christ on the cross." Decicco denied any occurrence of this character, and testified that the defendant brandished a revolver from the window. While standing on the sidewalk one De Feo joined the party, and the deceased and Decicco went with him to his apartments in One Hundred and Fifteenth street, where they met Angelo Testa. There they played cards and drank beer. Between seven and eight o'clock in the evening all these persons went out of the house and stood on the sidewalk at the corner of One Hundred and Fifteenth street and First avenue, listening to music given at a political meeting in that vicinity. While there Marotta passed by on his way to a saloon to get beer. The deceased stepped away from his companions and spoke to Marotta and at this time the defendant approached him and inflicted the fatal wound. The occurrence was of the briefest duration, but as to its details there is the sharpest conflict between the witnesses. The three companions of the deceased, Decicco, Testa and De Feo, testified that the defendant approached the deceased and stabbed him in the abdomen without warning or altercation. The defendant and Marotta testified that the deceased seized the defendant by the coat and drew a revolver, and that thereupon the defendant struck him with the knife. The defendant testified that he was afraid of the deceased, and that when he saw the latter he opened his knife and put it opened into his pocket. After striking the blow the defendant ran away through the hallway and up the stairs of an adjacent house, to the roof, where he was apprehended by a police officer who there found the knife which the defendant had thrown away. No revolver was found on the deceased and his companions testified that he had none. The defendant was brought into the presence of the deceased, who identified him as the man who had inflicted the wound. The deceased died the following day. * * *

It is contended that the trial court erred in its instructions to the jury. At the request of the prosecution the court charged: "To establish the defense of justifiable homicide it is the duty of one engaged in a quarrel to avoid an attack and not become the aggressor unless other means are unavailable, and if you find that the defend-

ant in this case having, on the afternoon of the 22d of October, been engaged in a quarrel with the deceased, and desiring to continue that quarrel, descended from the house of Bernardino Marotta to the street, and knew that the deceased was in the street, and with the intention of continuing that quarrel, and for the purpose of making his quarrel effective, took with him a dangerous weapon, and if under those circumstances the defendant sought out the deceased in the public street and entered upon the quarrel which had been interrupted, even though the deceased, under such circumstances, merely drew a revolver, the defendant may be regarded as the assailant and the wrongdoer, and his action in stabbing the deceased is not justifiable homicide," to which the defendant duly excepted. It is urged that the charge was erroneous, in that it ignored the consideration that to deprive a person who commences a quarrel of the right to self-defense the quarrel must be brought on or the assault committed with a felonious intent either to kill or inflict grievous bodily harm on his antagonist. What are the rights and what are the responsibilities of the original aggressor who takes life in a quarrel have been the subject of much discussion by the text writers and in judicial opinions. The strict rule has been stated in England that "No man shall justify the killing of another by pretense of necessity unless he were himself without fault in bringing that necessity upon himself." (1 Hawkins P. C. 82, 83; see, also, 1 East P. C. 278.) This extreme doctrine has not been accepted in the later cases in this country. It has been held that if the defendant withdraw from the quarrel which he has provoked and this is made known to his antagonist and after such withdrawal his antagonist assails him with intent to take his life or inflict grievous bodily harm, he may lawfully defend himself. (*Stoffer v. State*, 15 Ohio St. 47.) The doctrine has been further limited even where the original aggressor has not entirely withdrawn from the quarrel, but the quarrel was commenced with no intention to either take the life of the opposite party or inflict upon him grievous bodily harm. (*Wallace v. U. S.*, 162 U. S. 466; see *Adams v. People*, 47 Ill. 376; *Reed v. State*, 11 Tex. App. 509.) In the *Wallace* case it is said: "Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defense; but where the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder." But this must not be construed as implying the proposition that under the circumstances last stated the killing would be justifiable homicide. In the case then before the court the prisoner had been convicted of murder and the question under review was the exclusion of certain testimony which it was claimed tended to reduce

the crime from murder to manslaughter, and the statement quoted was made with reference to that question. This appears from the fact that the Illinois case and the Texas case cited are quoted with approval. The doctrine of these cases is very plain. In the Illinois case the court said: "That where the accused sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention, he would be guilty of murder; but that if the jury found that the accused voluntarily got into the difficulty or fight with the deceased, not intending to kill at the time, but not declining further fighting before the mortal blow was struck, and finally drew his knife and with it killed the deceased, the accused would be guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by the deceased or to prevent the deceased from getting the advantage of him in the fight." In the Texas case the court said of self-defense: "It may be divided into two general classes, to-wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned. * * *

If he was engaged in the commission of a felony and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law." The doctrine of these cases seems to us entirely just and to be as favorable to a defendant as can be upheld consistently with proper protection of human life. Tersely

stated, it is that if one takes life though in defense of his own life in a quarrel which he himself has commenced with the intent to take life or inflict grievous bodily harm, the jeopardy in which he has been placed by the act of his antagonist constitutes no defense whatever, but he is guilty of murder. But if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his act, but his offense is reduced from murder to manslaughter.

Tested by this rule the charge of the trial court was not erroneous. Some parts of it are subject to criticism as being indefinite. The first proposition, that "to establish the defense of justifiable homicide, it is the duty of one engaged in a quarrel to avoid an attack and not become the aggressor, unless other means are unavailable," stated unquestionably the correct rule of law. (*People v. Sullivan*, 7 N. Y. 396.) In the second proposition, "and if you find that the defendant in this case * * * with the intention of continuing that quarrel, and for the purpose of making his quarrel effective, took with him a dangerous weapon, and if, under those circumstances, the defendant sought out the deceased in the public street and entered upon the quarrel which had been interrupted, even though the deceased, under such circumstances, merely drew a revolver, the defendant may be regarded as the assailant and the wrongdoer and his action in stabbing the deceased is not justifiable homicide," there is a lack of clearness. It is not entirely plain what is the meaning of the expression "and for the purpose of making his quarrel effective." If this is to be understood as meaning with the purpose of taking the life of the deceased or inflicting upon him grievous bodily harm, then, concededly, the charge was proper. I am not sure that, taken in connection with the qualification stated by the court, that the jury should find that the deceased took with him a dangerous weapon, such is not the fair meaning of the charge. But assuming that the charge is capable of the interpretation that if the jury should find that the defendant renewed the quarrel, whether with or without intent to take life or inflict grievous bodily harm, the killing of the deceased was not justifiable homicide, it was nevertheless correct, for, under the doctrine of the cases cited, the absence of intent to take life or work grievous bodily injury would not make the subsequent act of the defendant justifiable homicide but only reduce his offense to manslaughter. As to this grade of crime the instructions of the trial court were full and fair.

The judgment should be affirmed.

Parker, Ch. J., Bartlett, Haight, Martin and Werner, JJ., concur with Cullen, J.; Vann, J., reads dissenting memorandum.

Judgment of conviction affirmed.

Section 2.—Defense of Others.

"The defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects the passions of the human mind, and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudent motives are strong enough to restrain." 3 Black. Com. 3.

"The like law had been for a master killing in the necessary defense of his servant, the husband in the defense of the wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had, if it had been done by himself, for they are in mutual relation one to another. 1 Hale P. C., ch. 40, § 2.

STATE v. HENNESSY.

1907. SUPREME COURT OF NEVADA. 29 Nev. 320, 90 Pac. 221,
13 Ann. Cas. 1122.

Appeal from the District Court of the Third Judicial District of the State of Nevada, Nye county; Peter Breen, judge.

John H. Hennessy was convicted of manslaughter, and from the judgment and an order denying a new trial, he appeals. Reversed, and remanded for new trial.

The facts sufficiently appear in the opinion.

By the court, NORCROSS, J.:¹²

The appellant was convicted of manslaughter in the third judicial district court in and for the county of Nye, under an indictment charging him with the murder of one Frank Ganahl on or about the 27th day of January, 1906, at the town of Clifford, in said county, and upon such conviction was sentenced to serve a term of five years and nine months in the state prison. From the judgment of conviction, and from an order denying his motion for a new trial, the defendant has appealed.

¹² Arguments of counsel, and part of the opinion are omitted.

Upon the trial the defendant admitted the killing of Ganahl, but set up as a justification therefor that it was done in the defense of his own person and that of one Max Elftman.

* * * * *

If defendant believed as a reasonable man that Max Elftman was assaulted and was in danger of losing his life or of suffering great bodily harm at the hands of Ganahl, he had the same right to defend Elftman as the latter would have to defend himself, and whatever would be competent evidence in Elftman's favor, if Elftman had done the killing, would be competent in favor of the defendant. Mr. Bishop, in speaking of the right to assist others in defense of their person, says: "The doctrine here is that whatever one may do for himself he may do for another: * * * and on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." (1 Bishop on Criminal Law, 877.)

Another writer uses this language: "A well-grounded belief that a felony is about to be committed will extenuate homicide committed in prevention but not in pursuit, by a volunteer. * * * A bona fide belief that a felony is in process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable; but the belief must be honestly entertained, and without negligence, and, if non-negligent, it will excuse the homicide. * * * A person has a right to repel a felony threatened to be perpetrated either on himself or others. * * * The intentional infliction of death is justifiable, when it is inflicted by any person in order to defend himself or any other person from immediate and obvious danger of instant death or grievous bodily harm, if he, in good faith, and on reasonable grounds, believes it to be necessary when he inflicts it. * * * Self-defense will justify a person defending those with whom he is associated, and in killing, if he believes life is in danger; and the right may be exercised by the servants and friends of the party assaulted, or any one present, in repelling an attempted felony." (Desty's American Criminal Law, 125d, 126, 126a.)

Kerr, in his work on the law of homicide, discussing the same subject, says: "It is well established that what one may do in his own defense, another may do for him, if he believes life is in immediate danger, or if such danger and necessity be reasonably apparent, provided the party in whose defense he acts was not in fault. * * * And it is the duty of a man who sees a felony attempted by violence to prevent it if possible. This is an active duty, and hence he has a legal right to use the means necessary to make the resistance effectual. If A be unlawfully assaulted by B, and his life thereby endangered, he may, by reason of not being in fault, defend it even to the extent of taking the life of the person who is in fault; and, as the right is a natural one, rules of law restricting it must, in order

that it may still be effective, be adapted to his character and nature. He may therefore act upon appearances, if he acts reasonably; and if assailed by another, and he believes, and has reasonable ground to believe, that his life is thereby endangered, he may even take life in its apparent necessary defense. So great, however, is the law's regard for human life, that he must be careful and not violate the restrictions that law and society have placed upon this right of self-defense, to wit, he must act from necessity, and not be in fault." (Kerr on Homicide, 168.)

See, also, *Stanley v. Commonwealth*, 86 Ky. 440, 6 S. W. 155, 9 Am. St. 305; *In re Neagle*, 135 U. S. 1, 34 L. ed. 55; *People v. Travis*, 56 Cal. 251; *State v. Felker*, 27 Mont. 456, 71 Pac. 568; *Wharton on Homicide*, § 532; text and authorities cited in 21 Cyc. 826, and 21 Am. & Eng. Ency. Law (2d ed.) 207; *Comp. Laws*, 4001, 4680.

Persons acting in defense of others are upon the same plane as those acting in defense of themselves. Therefore, every fact which would be competent to establish justification in the one case would, for the same reason, be competent to establish it in the other. (4 *Elliott on Evidence*, note to § 3041s; *State v. Felker*, 27 Mont. 451, 71 Pac. 668; *People v. Curtis*, 52 Mich. 616, 18 N. W. 385; *Wood v. State*, 128 Ala. 27, 29 So. 557, 86 Am. St. 71; *State v. Austin*, 104 La. 409, 29 So. 23; *Foster v. State*, 102 Tenn. 33, 49 S. W. 747.) Had Elftman killed Ganahl in the encounter which occurred, it would have been competent for him to have shown in his defense that a conspiracy had been entered into by Ganahl and others to take his life or to do him great bodily harm, or that Ganahl alone had made threats to do such violence, and for the same reason testimony of this nature would be competent in Hennessy's defense; the latter claiming to have done the killing in the necessary defense of Elftman. * * *

Judgment reversed.

WEAVER v. STATE.

1911. COURT OF APPEALS OF ALABAMA. 1 Ala. App. 48, 55 So. 956.

Appeal from Bessemer City Court.

Heard before Hon. J. C. B. Gwin.

Griffin Weaver was indicted and convicted of murder in the second degree, and he appeals. Affirmed.

PELHAM, J.¹³—* * * As a general proposition, the right of one to defend another is coextensive with the right of the other

¹³ Arguments of counsel, and part of the opinion are omitted.

to defend himself, and the one who defends the other is upon no higher plane than the one defended; and, so, if the one defended is not free from fault in bringing on the difficulty, his defender can not be, for when one intervenes to defend another, even though that one be in imminent danger to life or limb, he does so at his peril, if he strikes in defense of one not free from fault in bringing on the difficulty.—*Gibson v. State*, 91 Ala. 64, 9 So. 171; *Karr v. State*, 106 Ala. 1, 17 So. 328; *Bostic v. State*, 94 Ala. 45, 10 So. 602; *Sherrill v. State*, 138 Ala. 3, 35 So. 129.

The charge requested by the defendant, "If the jury believe from the evidence that the defendant, at the time he fired the alleged pistol shot, honestly and reasonably believed that his brother was in imminent peril of his life, and honestly and reasonably believed his said brother was not at fault in bringing on the difficulty, and that there was no means of escape by retreat for his said brother, then I charge you that the defendant would have the right to act upon appearances and defend his brother," does not state a correct proposition of law, and there was no error in refusing it, for that it predicates the defendant's right to strike in defense of his brother on the defendant's honest and reasonable belief of his brother (one of the principals) not having been at fault in bringing on the difficulty, when his belief is not sufficient. The condition must have existed as an actual fact that the brother, who was a principal in the difficulty, was free from fault to authorize the defendant to intervene and strike in self-defense in his behalf.

The case of *Sherrill v. State*, 138 Ala. 3, 35 So. 129, cited and relied upon by appellant, is not in conflict with this rule. In that case the court held on appeal that the oral charge of the court below was free from error, which was to the effect that if the defendant knew his wife, in whose behalf he struck, provoked the difficulty, or was not free from fault in bringing it on, his plea of self-defense was of no avail. The question of whether a charge to the effect that the defendant must know as a matter of fact and not simply have an honest belief, that the person for whom he intervenes is free from fault, or else he strikes at his peril, was not before the court, and was not passed upon in that case; but the general principle is clearly and correctly stated in the following language: "The defense being that the blow was struck by defendant to prevent the homicide of his wife by the deceased, the wife, as well as the defendant, must have been in a condition to invoke the doctrine of justifiable homicide." (*Sheriff's Case*, *supra*)—one of the conditions being freedom from fault in bringing on the difficulty

* * *

Affirmed.¹⁴

¹⁴ By the great weight of authority one who intervenes to protect a third person, stands upon the same plane as that person, and has no

Section 3.—Defense of Dwelling.

"But if A had attempted a burglary upon the house of B to the intent to steal, or to kill him, or had attempted to burn the house of B, if B or any of his servants, or any within his house, had shot and killed A this had not been so much as felony, nor had he forfeited ought for it, for his house is his castle of defense, and therefore he may justify assembling of persons for the safeguard of his house. * * * But otherwise it is, as hath been said in case of a trespassable entry into the house, claiming a title, and not to commit felony." 1 Hale P. C., ch. 40, § 3.

STATE v. TAYLOR.

1898. SUPREME COURT OF MISSOURI. 143 Mo. 150, 44 S. W. 785.

APPEAL from Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

Affirmed.

ON REHEARING.

GANTT, P. J.¹⁵—The defendant was indicted in the Audrain Circuit Court for the murder of Lee Smith and was convicted of murder in the second degree and his sentence fixed at twenty years in the penitentiary. This cause was heard at the beginning of this term and the judgment of the circuit court was affirmed, but counsel for defendant having moved for a rehearing on the ground that this court had not considered certain instructions which the circuit court refused, it was granted.

The facts disclosed by the record are as follows:

The defendant, a negro man, lived in Mexico, Missouri, and on the night of the thirtieth day of January, 1897, the defendant and several other negroes were in a saloon drinking beer from a can. Lee Smith, the deceased, was a negro boy about sixteen or seventeen years old. Prior to the thirtieth day of January, 1897, no trouble had occurred between defendant and deceased. About that time there were a number of young negro men, musicians from Moberly, staying at the house of defendant and they were accustomed to play on their instruments in the evenings, and their music attracted

greater rights. See, however, *Monson v. State* (Tex.), 63 S. W. 647, holding that the culpability of one who kills in defense of another is to be determined by his own intent and not by the intent and fault of the one for whom he intervenes unless known to him. See also, *People v. Curtis*, 52 Mich. 616, 18 N. W. 385.

¹⁵ Arguments of counsel, and part of the opinion are omitted.

quite a number of their race to the house. After leaving the saloon that evening, defendant went to his home. It was disclosed in evidence that persons came and went in and out of the home of defendant without the ceremony of knocking. In the house at the time mentioned were several young negro men and young negro girls in different rooms. Shortly after defendant went home the deceased appeared in the house, and very soon thereafter a controversy arose between defendant and deceased as to which was the better man, physically, and the undisputed testimony shows that each of them pulled off his coat and went to fighting with his fists. The deceased was ejected from the house and went out with one Bright, who was a witness; and when he passed out of the house he was without his coat, and after going a short distance with Bright, he decided that he would return and obtain his coat. Bright went on and deceased returned to defendant's house, and the evidence shows when he returned the defendant was told Smith was outside, when he ran into another room and, seizing his musket, returned and said: "I will kill the first one that comes in." Thereupon Caldwell, another negro, grabbed the musket, and expostulated with Taylor, but to no purpose, and as Smith entered the door, Taylor wrenched the musket away from Caldwell, and exclaiming, "Get away from that door, I will kill the first man that comes in," immediately fired and Smith fell dead. Whereupon Taylor boasted to Caldwell that he had fired the shot. The coroner was immediately summoned and examined the body of Smith but found no weapons upon him. There was some testimony that Smith pushed or kicked the door open as he entered on his return, but there was counter evidence for the state contradicting this evidence, tending to show that there was no sign of violence to the door and the locks and latches were uninjured. [Here follows instructions to the jury and requests of the defendant to charge the jury.]

In a word it will be seen that defendant insists that defendant's dwelling house being "his castle" he had a right to defend it from a trespass even to the killing of deceased; that he had a right to take the life of deceased because of the trespass upon the dwelling house alone, irrespective of the nature of the trespass, whether it was committed with a design to commit a felony thereon or therein or upon its inmates, or was a mere trespass upon the property. That "one's dwelling house is his castle" is a maxim of the common law. This was ruled in *Semayne's case*, 5 Coke's Rep. 91 A.: "The house of every one is his castle and if thieves come to a man's house to rob or murder and the owner or his servants kill any of the thieves in defense of himself and his house it is no felony and he shall lose nothing." 3 Thos. Coke's Rep. 188. The principle is of feudal origin and essentially necessary in the early history of England when men were compelled to defend themselves in their homes,

by converting them into fortified castles. It will be observed that in Semayne's case the right to kill was limited to the resistance of the commission of a felony. It is insisted by defendant that at common law one was justifiable in killing a mere trespasser upon his dwelling house. We do not so understand the sages of the law. [Here follows a citation of ancient common-law authorities, including Lord Hale.]

Let us inquire as to our own country. Dr. Wharton, in his work on the law of homicide, in section 541, under the head of "Protection of Dwelling House," says: "When a person is attacked in his own house he need retreat no further. Here he stands at bay and may turn on and kill his assailant if this be apparently necessary to save his own life, nor is he bound to escape from his house in order to avoid his assailant." "In this sense and in this sense alone are we to understand the maxim that 'every man's house is his castle.'" "An assailed person, so we may paraphrase the maxim, is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made. But he is not entitled either in the one case or the other to kill his assailant unless he honestly and non-negligently believes that he is in danger of his life from the assault," or when a felonious assault is being made upon the house as to commit burglary, arson or other felony therein or against its inmates. This statement of the law is abundantly sustained by Archbold's Criminal Law, p. 221, and the authorities there cited. *Reg. v. Bull*, 9 C. & P. 22. See, also, *People v. Walsh*, 43 Cal. 447; *Carrol v. State*, 23 Ala. 28; *De Forest v. State*, 21 Ind. 23; *State v. Patterson*, 45 Vt. 308; *Morgan v. Durfee*, 69 Mo. 469.

It may as well be noted that if the aggressor is about to commit a felony it is wholly immaterial whether it is a felony at common law or by statute. In either case the owner of the house may protect himself or his house from the perpetration of a felony against either without retreating therefrom. *Davis, Crim. Law*, p. 156. The foregoing view of the law has been adopted by the general assembly of this state in defining justifiable homicide. *State v. O'Connor*, 31 Mo. 389. Section 3462, Revised Statutes 1889, provides that: "Homicide shall be deemed justifiable when committed by any person in either of the following cases: First, in resisting any attempt to murder such person or to commit any felony upon him or her or in any dwelling house in which such person shall be," etc.

We have thus gone at length into a review of the law upon this subject and we deduce from the decided cases and the standard authors that a mere civil trespass upon a man's dwelling house does not justify him in slaying the trespasser; that the owner may resist the trespass, opposing force against force, but he has no right to kill unless it becomes necessary to prevent a felonious destruc-

tion of his property, or the commission of a felony therein, or to defend himself against a felonious assault against his life or person; that if he kills without reasonable apprehension of immediate danger to his person or property, but in the heat of passion aroused by the trespasser, it will be manslaughter, but if one deliberately or premeditatedly kills another to prevent a mere trespass upon his property, whether that trespass could or could not otherwise be prevented, he is guilty of murder. Archbold's Crim. Law, 225. It is clear from a reading of the instructions that the circuit court so understood the law and correctly expounded it to the jury. There was ample evidence from which the jury could have found the defendant guilty of murder in either degree, and as no error was committed on the trial, the judgment is affirmed as first ordered and rehearing denied.

SHERWOOD and BURGESS, JJ., concur.

Section 4.—Defense of Property.

"If a man come to take my goods as a trespasser, I may justify the beating of him in defense of my goods, as hath been said, but if I kill him, it is manslaughter.

"But if a man come to rob me, or take my goods as a felon, and in my resistance of his attempt I kill him, it is *me defendendo* at least, and in some cases not so much.

"At common law, if a thief had assaulted a man to rob him, and he hath killed the thief in the assault, it had been *se defendendo*, but yet he had forfeited his goods, as some have thought. 11 Co. Rep. 82b, the other books be to the contrary. 26 Assiz. 32." 1 Hale P. C. ch. 40, § 3.

PRYSE v. STATE.

1908. COURT OF CRIMINAL APPEALS OF TEXAS. 54 Tex. Cr. 523, 113 S. W. 938.

Appeal from the District Court of Potter. Tried below before the Hon. J. N. Browning.

Appeal from a conviction of manslaughter; penalty, two years imprisonment in the penitentiary.

The opinion states the case.

BROOKS, J.¹⁶—Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary

¹⁶ Arguments of counsel, and part of the opinion are omitted.

The evidence shows the appellant walked into a saloon in Amarillo and remained there the greater part of the day drinking. Appellant finally proposed to treat all in the house, among others, the deceased, who was a Mexican. After the parties took a drink, the appellant, having expressed a desire to go off on the train, was informed that he had but ten minutes to reach the train. Appellant replied: "I want to talk to this party awhile," and he and the deceased started back and went into a little room at the back part of the saloon building, and in about a minute the shooting occurred. Appellant then walked out of the saloon without making a remark. The Mexican was found dead, and the justice of the peace who examined him found two small penknives in his pocket closed up, a pencil, and a piece of paper. Appellant testified that deceased got hold of him and jerked him into this little room. That he had a pocketbook with two ten-dollar bills in it in his hand; that deceased grabbed at it, and had hold of it, and also had a knife in his hand, and he, thinking deceased was trying to rob him, shot and killed him. There were no eyewitnesses to the transaction save and except appellant and deceased.

* * * * *

The 16th ground of the motion complains that the charge is contradictory and misleading in that, among other things, the court informed the jury in substance that any person who killed another to prevent a forcible taking from him and his possession of his property under a belief that it was necessary so to do to protect his said property, would be guilty of manslaughter. After telling the jury that an attempt to forcibly take money or other personal effect from a person would be adequate cause in law, and would, if not otherwise justifiable, reduce a homicide to manslaughter, the court proceeds and gives the following charge: "Now, if you believe from the evidence beyond a reasonable doubt, that the defendant with a deadly weapon, under the immediate influence of sudden passion aroused by adequate cause, as the same has been hereinbefore explained, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of robbery, death or serious bodily injury, with intent to kill, did in the county of Potter, and state of Texas, on or about the 14th day of December, 1907, as alleged, shoot and thereby kill said Joe M. Yborra, as charged in the indictment, you will find the defendant guilty of manslaughter and assess his punishment at confinement in the penitentiary for not less than two nor more than five years." This charge is erroneous. According to appellant's evidence, he had his pocketbook in his hand and deceased grabbed it and attempted to strike him with a knife when appellant shot and killed deceased. Under the law of this state appellant had a right to use whatever force was necessary to protect his property, and if in pro-

protecting his property, his life became in danger or his person of serious bodily injury, he had a right to act upon appearance of danger and slay the deceased, but as we understand this charge, the court tells the jury that if appellant attempted to retain possession of his property, and killed the deceased in order to do so, he would be guilty of manslaughter. This is not the law. Appellant had a right to his property; he had a right to its exclusive possession, and under the law of this state, he had a right, as stated, to use all the force necessary to protect his property, and in doing so, if his life or person became in danger of death or serious bodily injury, he would have a right to kill to protect his person and maintain his possession of his property. This question was very thoroughly discussed by us in the following cases: *McGlothlin v. State*, 53 S. W. (Tex.) 869; *Hopkins v. State*, 53 S. W. (Tex.) 619; *Sims v. State*, 36 Texas Crim. Rep. 154, and *Woodring v. State*, 33 Texas Crim. Rep. 26, and various other authorities of this court. The court, perhaps, had in mind in giving the above charge, this proposition: If the defendant had no apprehension of the Mexican taking his money, or fear thereof, and became angered at the fact that the Mexican attempted to take it, and laboring under passion, which rendered his mind incapable of cool reflection, he shot and killed the Mexican, then he would be guilty of manslaughter. In other words, he did not have a right to kill the Mexican because he barely attempted to get his property. If the facts rendered his mind incapable of cool reflection, and the jury thought same was adequate cause to produce such passion, it might be manslaughter. If the jury did not think it was adequate cause, it would be murder in the second degree.

* * * * *

For the error pointed out, the judgment is reversed and the cause is remanded.

Reversed and remanded.¹⁷

¹⁷ See *State v. Morgan*, 25 N. Car. 186 at 193, 38 Am. Dec. 714, in which Gaston, J., says: "Now when it is said that a man may rightfully use as much force as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification, that he shall not, except in extreme cases, endanger human life or great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed, by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong—which is essentially wicked, and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. * * * So it is clear that if one man deliberately kills another to prevent a mere trespass on his property—whether that trespass could or could not be otherwise prevented—he is guilty of mur-

Section 5.—Prevention of Felony.

STOREY v. STATE.

1882. SUPREME COURT OF ALABAMA. 71 Ala. 329.

Appeal from Talladega Circuit Court.

Tried before Hon. Leroy F. Box.

At the July term, 1881, of said court, Phil, alias Philip Storey, and William Storey, were jointly indicted for the murder of Josiah Hall; and at a subsequent term they were tried, the jury returning the following verdict, as recited in the judgment-entry: "We, the jury, find the defendant William Storey not guilty, and find the defendant Philip Storey guilty, and sentence him to the penitentiary for two years." * * *

SOMERVILLE, J.¹⁸—* * * The record contains some evidence remotely tending to show that the prisoner was in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use.

If the property was merely converted, or taken possession of in such manner as to constitute a civil trespass, without any criminal intent, it would not be lawful to recapture it by any exercise of force which would amount even to a breach of the peace, much less a felonious homicide.—Street v. Sinclair, 71 Ala. 110; Burns v. Campbell, 71 Ala. 271.

Taking the hypothesis that there was a larceny of the horse, it becomes important to inquire what would then be the rule. The larceny of a horse is a felony in this state, being specially made so by statute, without regard to the value of the animal stolen.—Code, 1876, § 4358. The fifth charge requested by the defendant is an assertion of the proposition, that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable. The question is thus presented, as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute—a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common-law jurisprudence. The broad doctrine intimated by Lord Coke was, that a felon may be killed to prevent the commission of a felony without any inevitable cause, or

der. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide, not because he could take life to save his property, but he might take the life of the assailant to save his own."

¹⁸ Part of the statement of facts, and of the opinion are omitted.

as a matter of mere choice with the slayer.—3 Inst. 56. If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be, that “where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.” 4 Com. 181. The reason he assigns is, that the law is too tender of the public peace and too careful of the lives of the subjects to “suffer, with impunity, any crime to be prevented by death, unless the same, if committed, would also be punished by death.” It must be admitted that there was far more reason in this rule than the one intimated by Lord Coke, although all felonies at common law were punishable by death, and the person killing, in such cases, would seem to be but the executioner of the law. Both of these views, however, have been repudiated by the later authorities, each being to some extent materially modified. All admit that the killing can not be done from mere choice; and it is none the less certain that the felony need not be a capital one to come within the scope of the rule. *Gray v. Combs*, 7 J. J. Marsh. (Ky.) 478; *Cases on Self-Defence* (Horr. & Thomp.), 725, 867; *Oliver v. The State*, 17 Ala. 587; *Carroll v. The State*, 23 Ala. 28.

We find it often stated, in general terms, both by text writers and in many well considered cases, that one may, as Mr. Bishop expresses it, “oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon’s existence.” —1 Bish. Cr. Law, §§ 849-50; *The State v. Rutherford*, 1 Hawks 457. It is observed by Mr. Bishop, who is an advocate of this theory, that “the practical carrying out of the right thus conceded, is, in some circumstances, dangerous, and wherever admitted, it should be carefully guarded.” 1 Bish. Cr. Law, § 855.

After a careful consideration of the subject we are fully persuaded that the rule, as thus stated, is neither sound in principle, nor is it supported by the weight of modern authority. The safer view is that taken by Mr. Wharton, that the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force.—Whart. on Hom., § 539. Mr. Greenleaf confines it to “the prevention of any atrocious crime attempted to be committed by force; such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any other act of felony against the person” (3 Greenl. Ev. 115); and such seems to be the general expression of the common-law text writers.—1 Russ. Cr. 665-70; 4 Black. Com. 178-80; Whart. Amer. Cr. Law, 298-403; 1 East P. C. 271; 1 Hale P. C. 488; Foster 274. It is said by the authors of *Cases on Self-Defence*, that a killing which “appears to be reasonably necessary to prevent a forcible and atrocious felony against property, is justifiable homicide.” “This rule,” it is added, “the common-law writers do

not extend to secret felonies, or felonies not accompanied with force," although no modern case can be found expressly so adjudging. They further add: "It is pretty clear that the right to kill in defense of property does not extend to cases of larceny, which is a crime of a secret character, although the cases which illustrate this exception are generally cases of theft of articles of small value."—Cases on Self-Defence (Horr & Thomp.), 901-2. This was settled in *Reg. v. Murphy*, 2 *Crawf. & Dix C. C.* 20, where the defendant was convicted of shooting one detected in feloniously carrying away fallen timber which he had stolen from the premises of the prosecutor, the shooting being done very clearly to prevent the act, which was admitted to be a felony. Doherty, C. J., said: "I can not allow it to go abroad that it is lawful to fire upon a person committing a trespass and larceny; for that would be punishing, perhaps with death, offenses for which the law has provided milder penalties." This view is supported by the following cases: *State v. Vance*, 17 *Iowa* 144; *McClelland v. Kay*, 14 *B. Monroe (Ky.)* 106, and others not necessary to be cited. See *Cases on Self-Defence*, p. 901, note.

There is no decision of this court, within our knowledge, which conflicts with these views. It is true the rule has been extended to statutory felonies, as well as felonies at common law, which is doubtless the correct doctrine, but the cases adjudged have been open crimes committed by force, and not those of a secret nature.—*Oliver's case*, 17 *Ala.* 587; *Carroll's case*, 23 *Ala.* 28; *Dill's case*, 25 *Ala.* 15.

In *Pond v. The People*, 8 *Mich.* 150, after indorsing the rule which we have above stated, it was suggested by Campbell, J., that there might possibly be some "exceptional cases" not within its influence, a proposition from which we are not prepared to dissent. And again in *Gray v. Combs*, 7 *J. J. Marsh. (Ky.)* 478, 483, it was said by Nicholas, J., that the right to kill in order to prevent the perpetration of crime should depend "more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached by law." There is much reason in this view, and a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the night time, where no opportunity is afforded to recognize the thief, or obtain speedy redress at law. Both the Roman and Athenian laws made this distinction in favor of preventing the perpetration of theft by night, allowing, in each instance, the thief to be killed when necessary, if taken in the act.—4 *Black. Com.* 180, 181.

The alleged larceny in the present case, if it occurred at all, was in the open daylight, and the defendant is not shown to have been unable to obtain his redress at law. Where opportunity is afforded to secure the punishment of the offender by due course of law, the

case must be an urgent one which excuses a killing to prevent any felony, much less one not of a forcible or atrocious nature. Whart. Hom., §§ 536-8. "No man, under the protection of the law," says Sir Michael Foster, "is to be the avenger of his own wrongs. If they are of such a nature for which the law of society will give him an adequate remedy, thither he ought to resort."—Foster 296. It is everywhere settled that the law will not justify a homicide which is perpetrated in resisting a mere civil trespass upon one's premises or property, unaccompanied by force, or felonious intent. Carroll's case, 23 Ala. 28; Clark's Man. Cr. Law, §§ 355-7; Whart. on Hom., § 540. The reason is that the preservation of human life is of more importance than the protection of property. The law may afford ample indemnity for the loss of the one, while it utterly fails to do so for the other.

The rule we have above declared is the safer one, because it better comports with the public tranquillity and the peace of society. The establishment of any other would lead to disorderly breaches of the peace of an aggravated nature, and, therefore, tend greatly to cheapen human life. This is especially true in view of our legislative policy which has recently brought many crimes, formerly classed and punished as petit larcenies, within the class of statutory felonies. It seems settled that no distinction can be made between statutory and common-law felonies, whatever may be the acknowledged extent of the rule. Oliver's case, 17 Ala. 587; Cases on Self-Def., 901, 867; Bish. Stat. Cr., § 139. The stealing of a hog, a sheep, or a goat is, under our statute, a felony, without regard to the pecuniary value of the animal. So would be the larceny of a single ear of corn, which is "a part of any outstanding crop." Code, § 4358; Acts 1880-81, p. 47. It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in the broad daylight, commit a willful homicide in order to prevent the larceny of an ear of corn. In our judgment the fifth charge, requested by the defendant, was properly refused. It can not be questioned, however, that if there was in truth a larceny of the prisoner's horse, he, or any other private person had a lawful right to pursue the thief for the purpose of arresting him, and of recapturing the stolen property. Code, §§ 4668-70; 1 Bish. Cr. Proc. §§ 164, 165. He is not required, in such case, to inform the party fleeing of his purpose to arrest him, as in ordinary cases.—Code, § 4669. And he could, if resisted, repel force with force, and need not give back, or retreat. If, under such circumstances, the party making resistance is unavoidably killed, the homicide would be justifiable. 2 Bish. Cr. Law, § 647; 1 Russ. Cr. 665; State v. Roane, 2 Dev. 58. If the prisoner's purpose was honestly to make a pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the dif-

ficulty; but the law would not permit him to resort to the pretense of pursuit, as a mere colorable device, beneath which to perpetrate crime. * * *

There are some other questions raised in the record which we do not think necessary to discuss. The judgment of the circuit court must be reversed, and the cause remanded for a new trial. In the meanwhile, the prisoner will be retained in custody until discharged by due process of law.

Section 6.—Public Duty.

"It may be premised generally, that where persons having authority to arrest or imprison, or otherwise to advance or execute the public justice of the kingdom, and using the proper means for that purpose, are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable." * * *

"But though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity, in order to execute his duty." 1 East P. C., ch. 5, § 63.

LYNN v. PEOPLE.

1897. SUPREME COURT OF ILLINOIS. 170 Ill. 527, 48 N. E. 964.

Writ of error to the Circuit Court of Massac County; the Hon. A. K. Vickers, Judge, presiding.

At the November term, 1896, of the Circuit Court of Massac County plaintiff in error was convicted of the crime of murder and sentenced to the penitentiary for sixteen years. From this conviction tenced to the penitentiary for sixteen years. From this conviction

MR. JUSTICE CRAIG delivered the opinion of the court:¹⁹

* * * * *

The defendant was an officer whose duty was to preserve the peace. The official character of the officer is pertinent in determining the legal relations and duties of the person killed and the person killing, with respect to each other, and thus characterizing their acts at the time of the killing. In this instruction the jury are told that if the defendant went where the deceased was and

¹⁹ Part of the statement of facts, and of the opinion, and the arguments of counsel are omitted.

provoked and brought on a difficulty with him, into which he voluntarily entered,—regardless of the fact that he was an officer called to preserve the peace and that the difficulty was brought on by his attempt to keep the peace,—they must find defendant guilty. This instruction was erroneous and misleading in view of the testimony in the case. He did not go there voluntarily, but was called to quell a disturbance between the deceased and the woman Jennie Williams. He was a peace officer, and under the law could arrest without warrant for a criminal offense committed in his presence, or if a criminal offense had in fact been committed and he had ground for believing that the person to be arrested had committed it. In the case of *Shanley v. Wells*, 71 Ill. 78, which was an action of trespass for assault and battery and false imprisonment by the defendant, a policeman of the city of Chicago, this court said (p. 82): "In *Main v. McCarty*, 15 Ill. 441, it was held that the power to arrest without warrant for breaches of the peace or threats to break it, exists in cases where the act was not done or threat uttered in the presence of the officer, when the charge is freshly made and the officer was required to make the arrest." See, also, *Cahill v. People*, 106 Ill. 621.

The fifteenth instruction given on behalf of the People is as follows:

"A person when assailed is required to decline the combat in good faith, if by so doing he could put himself out of danger, and use all means that would be adopted by reasonable men to procure their safety under similar circumstances; and he has no right to take the life of another unless it is actually or apparently necessary, and the necessity, real or apparent, must be so pressing as to exclude all other reasonable means of safety before he will be justified in slaying his assailant."

Here the jury are told that "a person when assailed is required to decline the combat in good faith, if by so doing he could put himself out of danger, and use all means" to procure his safety. Is it true that an officer whose duty it is to preserve the peace is required to decline a combat when resisted, and should put himself out of danger? Clearly not. The court should give the law as applicable to the facts in evidence in the case. An officer lawfully in the discharge of his duty would be protected where a different rule would prevail as to private individuals. In 1 *Russell on Crimes* (§ 3, p. 447, Sharswood's 4th Am. ed.) the author says: "Ministers of justice, as bailiffs, constables, watchmen, etc., while in the execution of their offices are under the peculiar protection of the law—a protection founded in wisdom and equity and every principle of justice, for without it the public tranquillity can not possibly be maintained or private property secured, nor, in the ordinary course of things, will offenders be amenable to justice. For these reasons

the killing of officers so employed has been deemed murder of malice prepense, as being an outrage willfully committed in defiance of the justice of the kingdom." The same author, on page 547, says: "Amongst the acts done by permission of the law, for the advancement of public justice, may be reckoned those of the officer who, in the execution of his office, either in a civil or criminal case, kills a person who assaults or resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons have a right to arrest and imprison, and, using the proper means for that purpose, are resisted, in so doing they may repel force and need not give back, and if the party making resistance is unavoidably killed in the struggle this homicide is justifiable." The instruction was clearly erroneous in view of all the facts in the case, and was prejudicial to the defendant. * * *

Reversed and remanded.

HEAD v. MARTIN.

1887. COURT OF APPEALS OF KENTUCKY. 85 Ky. 480, 3 S. W. 622.

JUDGE HOLT delivered the opinion of the court.²⁰

The single question presented is, whether a peace officer may, in order to arrest one upon a warrant for bastardy, or to prevent his escape after arrest, kill him when fleeing. If he has the right under such circumstances to shoot and wound him, as was done in this instance, then it necessarily follows that he can not be held responsible if it results in death.

It is attempted to draw a distinction between a case where one is attempting to avoid arrest, and where one is endeavoring to escape after arrest. If, however, the offender is in flight, and is not at the time resisting the officer, then the law is the same, whether he be fleeing to avoid arrest or to escape from custody. (2 Bishop on Criminal Law, § 664; Wharton on Homicide, §§ 212-214.) The averments of the answer, admitted by the demurrer, show that the appellee, Martin, had in fact been arrested by the appellant, Head, as deputy sheriff, and was shot by the latter when fleeing from his custody; but the fact that an arrest had been made does not alter the law of the case.

A bastardy proceeding is, under our law, a civil one. Yet it proceeds in the name of the Commonwealth, and under the statute the offender is subject to arrest. As to the question now before us, it is, therefore, to be regarded in the same light as a misdemeanor.

²⁰ Arguments of counsel, and part of the opinion are omitted.

Our statute is silent, unless it may be regarded as speaking by implication, as to the force an officer may use in effecting an arrest, or in recapturing a prisoner. It merely provides, that "no unnecessary force or violence shall be used in making the arrest."

We, therefore, turn to the common law for guidance. By it an officer in a case of felony may use such force as is necessary to capture the felon, even to killing him when in flight. In the case of a misdemeanor, however, the rule is different. It is his duty to make the arrest; he may summon a posse, and may defend himself, if resisted, even to the taking of life; but when the offender is not resisting, but fleeing, he has no right to kill. Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity; they represent its majesty, and must be properly protected; but to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse, and take the offender.

The reason for this distinction is obvious. The security of person and property is not endangered by a petty offender being at large, as in the case of a felon. The very being of society and government requires the speedy arrest and punishment of the latter.

Bishop says: "The justification of homicide happening in the arrest of persons charged with misdemeanors, or breaches of the peace, is subject to a different rule from that which we have been laying down in respect to cases of felony; for, generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he can not otherwise be overtaken, and though there be a warrant to apprehend him; but under circumstances, it may amount only to manslaughter, if it appear that death was not intended. * * *

"But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance and the offender is killed in the struggle, the killing will be justified." (2 Bishop on Criminal Law, §§ 662-3.)

The same rule may be found in the works of the other common-law writers.

Hale says: "And here is the difference between civil actions and felonies. If a man be in danger of arrest by a *capias* in debt or trespass and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he can not be otherwise taken, if he be killed it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods." (1 Hale's Pleas of the Crown, page 481.)

So great, however, is the law's regard for human life, that if even a felon can be taken without the taking of life, and he be slain,

it is at least manslaughter. Even as to him, it can be done only of necessity.

An officer in arresting or preventing an escape for a misdemeanor may oppose force to force, and sufficient to overcome it, even to the taking of life. If the offender puts the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection.

It is often said, that an officer may use such force as is necessary to make an arrest. Generally speaking, this is true. It is so said in the cases of *Fleetwood v. Commonwealth*, 80 Ky. 1, and *Mocabee v. Commonwealth*, 78 Ky. 380. But in those cases a deadly affray between parties was in progress or about to occur, endangering the lives not only of the participants, but innocent persons; and it was the duty of the officer, when resisted, to quell it even at the sacrifice of human life. In these cases he was justified in killing, not only *se defendendo*, but to prevent the impending commission of a felony.

In case, however, of a mere riot upon one day, and an attempted arrest upon the next, surely the officer would not be justified in killing the offender when fleeing from custody or to escape arrest. A person commits a misdemeanor by the use of profane language; he flees from the officer attempting to arrest him or from custody. The dictates of humanity as well as the legal rule forbid the taking of his life under such circumstances.

The officer must in such a case summon his posse, and take him. He has no more right to kill him than he would have if the offender were to lie down and refuse to go with him. * * *

The demurrer was, therefore, properly sustained, and the judgment must be affirmed.²¹

Section 7.—Domestic Authority.

"Excusable homicide is either *per infortunium*, or *se defendendo*. * * * And first of homicide *per infortunium*, or by misadventure, which is where a man in doing a lawful act, without any intent of hurt, unfortunately chances to kill another; as * * *

²¹ Accord: Holding that a homicide committed in arresting a misdemeanant, is justifiable only in strict self-defence, and that a fleeing misdemeanant can not be shot down to prevent escape; *Smith v. State*, 59 Ark. 132, 26 S. W. 713, 43 Am. St. 20; *Bowman v. Commonwealth*, 96 Ky. 8, 27 S. W. 870; *State v. Stancill*, 128 N. Car. 606, 38 S. E. 926; *Brown v. Weaver*, 76 Miss. 7, 23 So. 388, 42 L. R. A. 423, 71 Am. St. 512; *Conraddy v. People*, 5 Park. Cr. (N. Y.) 234; *United States v. Rice*, 1 Hughes 560, Fed. Cas. No. 16153.

or a master his servant, or an officer in whipping a criminal condemned to such punishment, happens to occasion his death (yet, if such persons in their correction be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least; and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, etc., or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder)." 1 Hawkins P. C., ch. 29, §§ 1-5.

FULGHAM v. THE STATE.

1871. SUPREME COURT OF ALABAMA. 46 Ala. 143.

PETERS, J.²²—This is a criminal prosecution by indictment upon a charge of assault and battery by the husband upon the person of the wife. The defense relied on by the accused is, that a husband may give his wife moderate correction in order to secure her obedience to his just commands.

This authority on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Judge Blackstone, or as he says, "in the polite reign of Charles the Second," except among "the lower rank of the people, who were always fond of the old common law," by which "they claim and exert their ancient privilege" to give their wives "moderate correction," to secure subordination in the family. 4 Bl. Com. 444, 445, marg. page. It will be seen from this reference, that this eminent and classic commentator on the law of England confines this brutal and unchristian "privilege" wholly to the "lower rank of the people." The most zealous advocates of "wife-whipping" have never gone beyond this unhappy rank. It has never been contended that this liability to be corrected with blows and stripes was the law for the wives of all the people—of those of the higher as well as those of the lower rank. The language of the authority relied on by the learned counsel for the accused, clearly shows that there was a rank of the people excluded from its operation. Such partial laws can not be enforced in this state. The law for one rank is the law for all ranks of the people, without regard to station. Judge Blackstone calls it merely an ancient privilege, and quotes no decided case, and possibly none such could then be found, which supports the privilege referred to by him, as an universal law. This distinguished author

²² The statement of facts, and part of the opinion are omitted.

published his commentaries above one hundred years ago, when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here. If it was, the offense of witchcraft and sorcery, which were crimes at common law, and most cruelly punished against the voice of both reason and religion, might be indicted here. 4 Bl. Com., p. 60. Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is, therefore, not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not acknowledged by our law. * * *

The husband may exercise over the wife "gentle restraint." 2 Kent 181. And he may have security of the peace against the wife, and the wife against him. 4 Bla. Com. 445. And they may be indicted for assault and battery upon each other. *Bradley v. The State*, Walker R. 156. But beyond this, "the rule of love has superseded the rule of force." Schoul. Dom. Rel. 59.

There was, then, no error in the charge given, or in refusing the charge asked. Therefore, let the judgment of the court below be in all things affirmed.²³

Peck, C. J., dissenting.

HOLMES v. STATE.

1905. SUPREME COURT OF ALABAMA. 39 So. 569.

Appeal from Clay County Court, W. J. Pearce, judge. Not officially reported.

Delmeda Holmes was convicted of an assault and battery, and he appeals. Affirmed.

DENISON, J.²⁴—The defendant, a schoolmaster, was tried in the county court of Clay county for an assault and battery on Maggie Stansell, a girl 16 years old, who at the time was a pupil in the school that was being kept by the defendant. The case was tried

²³ See the following cases holding that the husband may not chastise his wife: *Lawson v. State*, 115 Ga. 578, 41 S. E. 993; *Carpenter v. Commonwealth*, 92 Ky. 452, 18 S. W. 9; *State v. Oliver*, 70 N. Car. 60.

²⁴ Part of the opinion is omitted.

by the court without the intervention of a jury. The court on the evidence rendered judgment finding the defendant guilty and assessed a fine of \$10. From the judgment of conviction the defendant appeals.

The law applicable to the case has been plainly and elaborately declared in the case of *Boyd v. State*, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31, and it is wholly unnecessary to go into an extended discussion of it here. In that case it was held "that one standing *in loco parentis*, exercising the parent's delegated authority, may administer reasonable chastisement to a child or pupil to the same extent as the parent himself; and to fasten upon him the guilt of criminality he must not only inflict on the child immoderate chastisement, but he must do so *malo animo*, with legal malice, or wicked motives, or else he must inflict on him some permanent injury. If there be no permanent injury inflicted, or no legal malice can be inferred, no conviction should follow." * * *

There is no error in the record, and the judgment of conviction must be affirmed.

McClellan, C. J., and Tyson and Simpson, JJ., concur.

CHAPTER IX.

DEFENSES CONTINUED.

Section 1.—Duress.

“Another species of compulsion or necessity is what our law calls duress *per minas*; or threats and menaces which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanours; at least, before the human tribunal. But then that fear which compels a man to do an unwarrantable action ought to be just and well grounded. * * * Though a man be violently assaulted and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent. But, in such a case, he is permitted to kill the assailant; for there the law of nature, and self-defense, its primary canon, have made him his own protector. 4 Black. Com. 30.

ROSS v. STATE.

1907. SUPREME COURT OF INDIANA. 169 Ind. 388, 82 N. E. 781.

From Tipton Circuit Court, J. F. Elliot, judge.

Prosecution by the State of Indiana against Abbie Ross. From a judgment of conviction, defendant appeals. Affirmed.

MONKS, C. J.—Appellant was convicted of the crime of arson, under § 2260 Burns' 1908, Acts 1905, pp. 584, 665, § 371.

The only error assigned is that the court erred in overruling the motion for a new trial. The only causes for a new trial not waived call in question the action of the court in refusing to admit certain evidence offered by appellant. We need set out only two of these offers to determine all the questions presented by appellant. During the progress of the trial counsel for appellant, after asking a question to which the state objected, made the following offer to prove: “We offer to prove by this witness that he was acquainted with the defendant's mental condition at the time of the commission

of the alleged offense, and that she was weak in will power, easily persuaded, timid and shy. We offer to show this, not for the purpose of proving the unsoundness of mind on the part of this defendant, but to show that she acted under duress at the time of the commission of the alleged offense." Appellant afterwards made the following offer to prove in answer to a question to which the state had objected: "Now the defendant offers to prove in response to such question that a short time prior to the commission of the alleged offense, Silas Ray drew a revolver on this defendant and threatened to kill her, thereby putting her in fear at the time."

It is said, Gillett Crim. Law (2d ed.), § 7: "As to the necessity which excuses a criminal act, it must be clear and conclusive, and must arise without negligence or fault of the person who insists upon it as a defense. The alternative presented must be instant and imminent, and there must be, if not a physical, at least a moral, necessity for the act. [The Argo (1812), 1 Gall. 150, Fed. Cas. No. 516.] * * * If a person is compelled to commit a crime by threats of violence sufficient to induce a well-grounded apprehension of death or serious bodily harm, in case of refusal, this excuses him." In Stephen, Digest of Crim. Law (5th ed.), Art. 32, it is said: "An act which if done willingly, would make a person a principal in the second degree or an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him or to do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offense." Again in *McCoy v. State* (1887), 78 Ga. 490, the court says: "It must be obvious to the deliberate judgment of every reflecting mind that much less freedom of will is requisite to render a person responsible for a crime than to bind him by sale or other contract. To overcome the will so far as to render it incapable of contracting a civil obligation, is a mere trifle compared with reducing it to that degree of slavery and submission which will exempt from punishment." [For cases cited at this point, see foot note 1 below.] In *Bain v. State*, 67

¹ See 1 Bishop, Crim. Law (8th ed.), §§ 346-355; 1 Whart. Crim. Law (10th ed. by Lewis), § 94; 1 Russell, Crimes (8th Am. ed.), 17, 18; Clark & Marshall Crim. Law (2d ed.), § 83; 12 Cyc. Law and Proc., 161; 1 McLain, Crim. Law, §§ 136, 137; *People v. Repke*, (1895), 103 Mich. 459, 61 N. W. 861; *Thomas v. State*, (1901), 134 Ala. 126, 33 So. 130; *Arp v. State* (1893), 97 Ala. 5, 12 So. 301; 19 L. R. A. 357 and note, 38 Am. St. 137; *Leach v. State* (1897), 99 Tenn. 584, 42 S. W. 195; *State v. Fisher* (1900), 23 Mont. 540, 59 Pac. 919; *Bain v. State* (1890), 67 Miss. 557, 7 So. 408; *State v. Nargashian* (1904), 26 R. I. 299, 58 Atl. 953, 105 Am. St. 715 and notes pp. 721-728; *Burns v. State* (1892), 89 Ga. 527, 15 S. E. 748; *Beal v. State* (1883), 72 Ga. 200; *Rizzolo v. Commonwealth* (1889), 126

Miss. 557, it was held, that a person on trial for perjury can not defend on the ground that his false testimony was given under fear engendered from threats against his life before going to court; and the court said: "We can conceive of cases in which an act, criminal in its nature, may be committed by one under such circumstances of coercion as to free him from criminality. The impelling danger, however, should be present, imminent and impending, and not to be avoided." In *Burns v. State*, 89 Ga. 527, it was said in the syllabus: "The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act. Thus, where the forbidden act is perjury by a witness at a coroner's inquest, the danger of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse."

It is manifest that the evidence of appellant's mental weakness and want of will-power, and threats of Ray, stated in said offers, would not be admissible as independent testimony to prove the kind of compulsion or coercion essential to free her from criminality in setting fire to and burning said dwelling-house.

There was nothing in the second offer to prove that indicated that the act of Ray in drawing his revolver on appellant and threatening to kill her, as stated in said offer, had anything whatever to do with her committing the crime charged. * * *

Judgment affirmed.²

BREWER v. STATE.

1904. SUPREME COURT OF ARKANSAS. 72 Ark. 145, 78 S. W. 773.

RIDDICK, J.³—* * * The only remaining questions relate to the instructions given by the court to the jury. The court refused to instruct the jury that, if the defendant shot Dortch under compulsion by third parties to save his own life, they should acquit, but, on the contrary, told them that, though one may lawfully kill an assailant, if it be necessary to save his own life, he can not lawfully slay an innocent third person, even to save his own life, but ought to die himself rather than take the life of an innocent person. The question presented by the exception to this ruling has been discussed by text writers more often than by the courts. But we feel

Pa. St. 54, 17 Atl. 520; *Respublica v. McCarty* (1781), 2 Dall. (Pa.) 86, *United States v. Vigol* (1795), 2 Dall. (U. S.) 345, 1 L. ed. 409, Fed. Cas. No. 16621; *United States v. Haskell* (1823), 4 Wash. C. C. 402, Fed. Cas. No. 15321.

² Part of the opinion is omitted.

³ The statement of facts, arguments of counsel, and part of the opinion are omitted.

very certain that unlawful compulsion of the kind set up as a defense in this case is not a sufficient justification for taking the life of an innocent person. Sand. & H. Dig. § 1448; *Arp v. State*, 97 Ala. 5, 19 L. R. A. 359, 38 Am. St. Rep. 137; *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. Dudley*, 14 Q. B. Div. 273; 4 Blackstone, p. 30.

Whether, under some circumstances, compulsion of that kind might go to reduce the grade of the offense and in mitigation of the punishment, we need not stop to inquire, for, if we should concede that this was so, the evidence here does not establish any such compulsion. The only evidence to prove compulsion was a confession made by defendant. While all parts of the confession must be considered, yet the jury were not required to believe such portions of it as seemed to them unreasonable and improbable. And, though they found that Brewer killed Dortch, they no doubt rejected the improbable story that he did so under compulsion by armed men, who walked through the woods with masks on their faces, stopping occasionally to rub on the bottom of their shoes a red looking liquid which they kept in a bottle. This part of the confession was certainly uncorroborated, and was first concocted and told by Brewer to one of his friends under the belief that blood hounds were about to be put on the trail. It was, no doubt, an effort on his part to put forth some plausible excuse that might shield him in the event he was run down and arrested.

But if we take this confession as literally true, it does not show that defendant had no other option except to lose his own life or take that of Dortch. He said that two men armed with a shotgun and pistol captured him and compelled him to pilot them to the Dortch place, and then gave him one of the shotguns, and ordered him to kill Dortch, but he does not show why, after getting possession of the gun, he did not turn upon them and defend himself. The tracks where defendant lay in wait showed that only one man was there, and the circumstances indicated that, besides Dortch, there was present at the time he was killed only the man who fired the shot. A compulsion that could reduce or mitigate such a crime must have been more than a fear of future harm; it should appear that the danger of resisting such a force was immediate and impending. The confession does not locate the position of the masked men at the time the shot was fired, or show that there was no alternative for the defendant except to kill Dortch or lose his own life. For this reason, we think that the presiding judge was fully justified in telling the jury that under these circumstances compulsion was no justification or excuse for the crime charged. * * *

On the whole case, we find no prejudicial error, and are convinced that the judgment was right. It is therefore affirmed.⁴

⁴ In *State v. Nargashian*, 26 R. I. 299, 58 Atl. 953, 106 Am. St. 715, Stiness, C. J., says at p. 304: "The seventh request was: 'If the jury believe

Section 2.—Command.**PEOPLE v. RICHMOND.**

1866. SUPREME COURT OF CALIFORNIA. 29 Cal. 414.

Appeal from the County Court, El Dorado county.

The defendant appealed.

The other facts are stated in the opinion of the court.

By the court, SANDERSON, J.

The defendant was convicted of grand larceny.

At the trial one of the defendant's witnesses was questioned by his counsel as to the age of the defendant at the time the alleged offense was committed. Thereupon the court asked counsel "if the object of the question was to prove that the defendant was under age." Counsel replied "that his object was to show that defendant was to a certain extent under the control of his mother, and was acting under her direction, being under age." The district attorney then objected to the question, which objection was sustained by the court. It is claimed that the foregoing ruling was erroneous.

We understand the court as asking counsel if his object was to prove the defendant under the age of fourteen years; and counsel as replying that his object was to show that the defendant was to a certain extent under the control of his mother, and was acting under her direction, being under the age of twenty-one years. Such is the only conclusion that can be drawn from the language of the record. If the object of counsel was to prove that the defendant was under the age of fourteen, he should have so stated in terms not to be misapprehended. The record must affirmatively and

that the defendant assisted in killing Ouloosian, but under threats against the defendant by Kasper, as shown by the evidence, then they are to find the defendant guilty of manslaughter.' This request was refused. We have already seen that the intentional killing of another, under threats, is held to be murder. The only ground upon which the request is urged—indeed, the only ground upon which it can be urged—is that fear, like passion may so cloud the mind as to eliminate malice. The comparison of the two elements of action is not apt. One's own passion is not a defence to reduce a crime unless it is caused by provocation, like a fight or a gross indignity, between the victim and the assailant. Passion induced by a third person would be no defence to a homicide. So fear induced by one person is no defence to a defendant who kills another under its influence. This, of course, is a general rule, but it applies to this case. There might be cases, like a panic, where a general fear might not only reduce, but even excuse, an unlawful act, but such is not this case. If one has sufficient power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of fear. Something more, at least, must appear than is shown in this request or in this case."

clearly show error, and not leave it to be inferred from argument as to what the language of the record means. (*People v. Connor*, 17 Cal. 362.)

Had the object been to prove the defendant under the age of fourteen, the question would have been proper (section four of the act concerning Crimes and Punishments), but it was not competent to prove his age for the purpose stated. "The command of a superior to an inferior, as of a military officer to a subordinate, or of a parent to a child, will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent; but in all these cases the person doing the wrongful thing is guilty the same as though he had proceeded self-moved." (1 Bishop on Criminal Law, 275.)

Judgment affirmed.

Mr. Chief Justice Currey expressed no opinion.

COMMONWEALTH ex rel. WADSWORTH v. SHORTALL.

1903. SUPREME COURT OF PENNSYLVANIA.

206 Pa. St. 165, 55 Atl. 952, 98 Am. St. 759, 65 L. R. A. 193.

Petition for writ of habeas corpus on behalf of the relator against respondent, a constable who had him in custody under a warrant of arrest for homicide, issued by a justice of the peace in Schuylkill county.

Opinion by MR. JUSTICE MITCHELL, April 17, 1903⁵:

A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation not only of men but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property and killing of non-union workmen became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them.

Among the places where the disorder was greatest was Shenandoah in Schuylkill county. There the police and the sheriff in at-

⁵ Argument of counsel, and part of the opinion are omitted.

tempting to preserve the peace were overpowered and beaten by mobs of strikers, and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia and subsequently, on further call, the entire division of the national guard, on October 6, 1902, by General Order No. 39. * * *

Under this order the 18th regiment, being part of the troops under command of Brigadier-General Gobin, was stationed in and near Shenandoah. Several houses occupied by non-union men had been dynamited and attempts made upon others. On October 8, therefore, General Gobin issued the following order: "At 5:30 p. m. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowling around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the 18th regiment, in service there, and in the evening of October 8 was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house and called "Halt." The man continued to advance toward the gate. Wadsworth called again, "Halt." The man continued to advance. Wadsworth then touched the door and said, "Corporal of the guard." He then called "Halt" and again "Halt." The man by this time had opened the gate and was coming into the yard, when Wadsworth, in accordance with his orders, fired and the man, whose name was afterwards found to be Durham, fell to the ground dead. * * *

Coming now to the position of the relator, in regard to responsibility, we find the law well settled. "A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point, a soldier or member of the posse comitatus may obviously take the orders of the person in command into view

as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently, runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances." Hare Const. Law, p. 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the Articles of War (art. 59), under the acts of congress, officers or soldiers charged with offenses punishable by the laws of the land, are required (except in time of war) to be delivered over to the civil (i. e., in distinction from military) authorities; and the courts proceed upon the principles of the common (and statute) law. 31 Fed. Repr. 711. The decisions therefore are precedents applicable here.

A leading case is *U. S. v. Clark*, 31 Fed. 710. A soldier on the military reservation at Fort Wayne had been convicted by court martial and when brought out of the guard-house with other prisoners at "retreat," broke from the ranks and was in the act of escaping when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide and brought before the United States district judge, sitting as a committing magistrate. Judge Brown, now of the Supreme Court of the United States, delivered an elaborate and well considered opinion, which has ever since been quoted as authoritative. In it he said, "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code which practically abolish the distinction between felonies and misdemeanors, he continued: "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In *McCall v. McDowell*, 1 Abb. (U. S.) 212, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable

to the commonest understanding that the order is illegal, I can not but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander, otherwise he is placed in a dangerous dilemma of being liable to damages to third persons, for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto. * * * Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it can not be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court sitting without a jury accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In *U. S. v. Carr*, 1 Woods 480, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if on the other hand the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In *Riggs v. State*, 3 Cold. 85, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation, as already shown, was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground, therefore, for doubt as to the legality of the order to shoot. The relator was a private soldier and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them.

* * *

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.⁶

Section 3.—Necessity.

"If two be shipwrecked together, and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrust the other from it, whereby he is drowned, it seems that he, who thus preserves his own life at the expense of that of another, may justify the fact by the inevitable necessity of the case." 1 Hawkins P. C., ch. 29, § 26.

REGINA V. DUDLEY ET AL.

1884. QUEEN'S BENCH DIVISION. 15 Cox C. C. 624.

LORD COLERIDGE, C. J.⁷—The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th day of July in the present year. They

⁶ Accord: *Riggs v. State*, 3 Coldw. (Tenn.) 85, 91 Am. Dec. 272; but an order from a superior officer which, on its face, is clearly illegal, is not a defense. *United States v. Bevans*, 24 Fed. Cas. No. 14589, (reversed in 16 U. S. 336 on a jurisdictional question); *United States v. Carr*, 1 Woods (U. S.) 480, Fed. Cas. No. 14732; *United States v. Jones*, 3 Wash. C. C. (U. S.) 209, Fed. Cas. No. 15 494; *United States v. Clark*, 31 Fed. 710.

⁷ The statement of facts, arguments of counsel, and part of the opinion are omitted.

were tried before my brother Huddleston at Exeter on the 6th day of November, and, under the direction of my learned brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment. The special verdict is as follows: [The learned judge read the special verdict set out above.] From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation and to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned brother's notes, but nevertheless this is clear, that the prisoners put to death a weak and unoffending boy, upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that, "if the men had not fed upon the body of the boy, they would probably not have survived"; and that "the boy, being in a much weaker condition, was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this court to say what is the legal consequence which follows from the facts which they have found.

* * * First, it is said that it follows, from various definitions of murder in books of authority—which definitions imply, if they do not state, the doctrine—that, in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or anyone else. But, if these definitions be looked at, they will not be found to sustain the contention. The earliest in point of date is the passage cited to us from Bracton, who wrote in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeves tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling; but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal; and the crime of murder, it is expressly declared,

may be committed *lingua vel facto*; so that a man, like Hero, "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense, the repelling by violence—violence justified so far as it was necessary for the object—any illegal violence used towards oneself. If, says Bracton (Lib. III., Art., De Corona, cap. 4, fol. 120), the necessity be "*evitabilis, et evadere posset absque occisione, tunc erit reus homicidii*," words which show clearly that he is thinking of physical danger, from which escape may be possible, and that "*inevitabilis necessitas*," of which he speaks as justifying homicide, is a necessity of the same nature. It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justifies homicide is that only which has always been, and is now considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony." (1 Hale P. C. 491.) Again, he says that the necessity which justifies homicide is of two kinds: "(1) That necessity which is of a private nature; (2) That necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defense and safeguard; and this takes in these inquiries: 1. What may be done for the safeguard of a man's own life;" and then follow three other heads not necessary to pursue. Then Lord Hale proceeds: "1. As touching the first of these, viz., homicide in defence of a man's own life, which is usually styled *se defendendo*:" (1 Hale P. C. 478.) It is not possible to use words more clear to show that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called self-defense. But if this could be even doubtful upon Lord Hale's words, Lord Hale himself has made it clear, for, in the chapter in which he deals with the exemption created by compulsion or necessity, he thus expresses himself: "If a man be desperately assaulted, and in peril of death, and can not otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder if he commit the act, for he ought rather to die himself than to kill an innocent; but if he can not otherwise save his own life, the law permits him in his own defense to kill the assailant, for, by the violence of the assault and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own *protector cum debito moderamine inculpatae tutelae*. (1 Hale P. C. 51.) But, further still,

Lord Hale, in the following chapter, deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing, "theft is no theft, or at least not punishable as theft, and some even of our own lawyers have asserted the same;" "but," says Lord Hale: "I take it that here in England that rule, at least by the laws of England, is false, and therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is a felony and a crime by the laws of England punishable with death." (1 Hale P. C. 54.) If, therefore, Lord Hale is clear, as he is, that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder? It is satisfactory to find that another great authority, second probably only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the 3rd chapter of his Discourse on Homicide, deals with the subject of Homicide founded in Necessity, and the whole chapter implies, and is insensible unless it does imply, that, in the view of Sir Michael Foster, necessity and self-defence (which in § 1 he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it. In East (1 East P. C. 271), the whole chapter on Homicide by Necessity is taken up with an elaborate discussion of the limits within which necessity in Sir Michael Foster's sense (given above) of self-defence is a justification of or excuse for homicide. There is a short section at the end (p. 294), very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them; and the conclusion is left by Sir Edward East entirely undetermined. What is true of Sir Edward East, is true also of Mr. Serjeant Hawkins. The whole of his chapter on Justifiable Homicide assumes that the only justifiable homicide of a private nature is in defense against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with this significant expression from a careful writer, "It is said to be justifiable." So, too, Dalton, ch. 150, clearly considers necessity and self-defence, in Sir Michael Foster's sense of that expression, to be convertible terms; though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own; and there is a remarkable passage at p. 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him, even in self-defense, *cuncta prius tentanda*. The passage in Staundforde, on which almost the whole of the *dicta* we

have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton; showing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books, and adds no new authority nor any fresh considerations. Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the bar, who communicated with my brother Huddleston, to convey the authority, if it conveys so much, of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case⁸ cited by my brother Stephen in his Digest from Wharton on Homicide, p. 237, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but, on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord Mansfield in the case of *Rex v. Stratton* and others (21 St. Tr. 1045), striking and excellent as they are, were delivered in a political trial, where the question was, whether a political necessity had arisen for deposing a governor of Madras. But they have little application to the case before us, which must be decided on very different considerations. The one real authority of former times is Lord Bacon, who in his commentary on the maxim, "*Necessitas inducit privilegium quoad jura privata*," lays down the law as follows: "Necessity carrieth a privilege in itself. Necessity is of three sorts: Necessity of conservation of life, necessity of obedience, and necessity of the act of God, or of a stranger. First, of conservation of life. If a man steals viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord

⁸ *United States v. Holmes*, 1 Wall. Jr. (U. S.) 1, Fed. Cas. No. 15383.

Hale in the passage already cited. And for the proposition as to the plank or boat it is said to be derived from the canonists; at any rate, he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer, but it is permissible to much smaller men, relying upon principle and on the authority of others the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true; but, if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day. There remains the authority of my brother Stephen, who, both in his *Digest* (art. 32) and in his *History of the Criminal Law* (vol. 2, p. 108), uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary we must with true deference have differed from him; but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which, if he had been a member of the court, he would have been unable to agree. * * *

Now, it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is, generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*—these duties impose on men the moral necessity, not of the preservation, but of the sacrifice, of their lives for others, from which in no country—least of all it is to be hoped in England—will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. * * * It is therefore our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder.

Sir Henry James (A. G.) prayed the sentence of the court. The Lord Chief Justice thereupon passed sentence of death in the usual form.⁹

Judgment for the crown.

Section 4.—Consent.

REGINA v. CONEY.

1882. QUEEN'S BENCH DIVISION. 8 Q. B. Div. 534.

HAWKINS, J.¹⁰—At the Berkshire October Quarter Sessions, 1881, the defendants were convicted under the direction of Mr. Benyon, the chairman, upon two counts of an indictment. One charged them with an assault upon Charles Mitchell, the other with an assault upon John Burke; Mitchell and Burke being the combatants in a fight which took place at Ascot, on the 16th of June, 1881. The facts are fully set forth in the case reserved for the opinion of the Court of Criminal Appeal.

Two questions were argued before us. First, whether the combatants themselves were guilty of assaults upon each other; and, secondly, whether the defendants were aiders and abettors in the fight, and therefore also rightly convicted?

Upon the first question, the defendants' counsel contended that, each of the combatants having assented to the fight, neither could be convicted of an assault upon the other. To this contention I can not give my sanction. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all: *Christopherson v. Bare*, 11 Q. B. 473, *Reg. v. Guthrie* Law. Rep. 1 C. C. R. 241, 243, and numerous other cases. It may be that consent can in all cases be given so as to operate as a bar to a civil action; upon the ground that no man can claim damages for an act to which he himself was an assenting party; *Christopherson v. Bare*, 11 Q. B. 473. That case, however, was decided upon a point of pleading, and must not be considered as a direct authority on this subject. It is not necessary, however, upon the present occasion, to express any decided opinion upon the point; for, whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an

⁹ The prisoners were afterwards respited, and their sentence commuted to one of six months' imprisonment without hard labor.

¹⁰ The statement of facts, part of the opinion of Hawkins, J., and the concurring opinions of Cave Jr., Matthew J., Stephen J., Lopes J., Huddleston B., Manisty J., Pollock B., Denman J., and Coleridge C. J., are omitted.

effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution. In other words, though a man may by his consent debar himself from his right to maintain a civil action, he can not thereby defeat proceedings instituted by the crown in the interests of the public for the maintenance of good order. Per Burrough, J., in *Rex v. Bellingham*, 2 C. & P. 234. He may compromise his own civil rights, but he can not compromise the public interests.

Nothing can be clearer to my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize-fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt, then, that every such fight is illegal, and the parties to it may be prosecuted for assaults upon each other. Many authorities support this view. In *Rex v. Ward*, 1 East P. C. 270, the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public exhibition of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted. To the same effect is the case of *Reg. v. Lewis*, 1 C. & K. 419, in which Coleridge, J., said: "When two persons go out to strike each other, each is guilty of an assault." See also *Reg. v. Hunt*, 1 Cox C. C. 177, per Alderson, B.; *Reg. v. Brown*, 1 C. & M. 314, by the same learned baron, and by Bramwell, B., in *Reg. v. Young*, 10 Cox C. C. 371.

The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury, or to rouse angry passions in either, do not in the least militate against the view I have expressed; for such encounters are neither breaches of the peace nor are they calculated to be productive thereof; but if, under colour of a friendly encounter, the parties enter upon it with, or in the course of it form, the intention to conquer each other by violence calculated to produce mischief, regardless whether hurt may be occasioned or not, as, for instance, if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault. *Reg. v. Orton*, 39 L. T. 293. Whether an encounter be of the character I have just referred to, or a mere friendly game, having no tendency, if fairly played, to produce any breach

of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings.

The cases cited of alleged indecent assaults on young children by their consent are no authorities to the contrary, and may all be disposed of in this one observation, viz., that the indecent impositions of hands charged in those acts as assaults neither involved, nor were calculated to involve, breaches of the peace, and, therefore, being by consent, were not punishable as assaults, any more than they would have been had the objects of them been for the most innocent purposes. I think it wholly immaterial, in considering cases of this description, to inquire by whom the first blow was struck, for, as was said by Lindley, J., in *Reg v. Knock*, 14 Cox C. C. 1, "the right of self-defence does not justify counter blows struck with a desire to fight."

Upon the ruling of the chairman as to the illegality of the fight, I entertain, therefore, no manner of doubt, and I am clearly of opinion that the combatants themselves were each guilty of an assault upon the other.¹¹ * * *

REGINA v. BRADSHAW.

1878. LEICESTER SPRING ASSIZES. 14 Cox Cr. C. 83.

William Bradshaw was indicted for the manslaughter of Herbert Dockerty, at Ashby-de-la-Zouch, on the 28th day of February.

The deceased met with the injury which caused his death on the occasion of a football match played between the football clubs of Ashby-de-la-Zouch and Coalville, in which the deceased was a player on the Ashby side, and the prisoner was a player on the Coalville side. The game was played according to certain rules known as the "Association Rules." After the game had proceeded about a quarter of an hour, the deceased was "dribbling" the ball along the side of the ground in the direction of the Coalville goal, when he was met by the prisoner, who was running towards him to get the ball from him or prevent its further progress; both players were running at considerable speed; on approaching each other, the deceased kicked the ball beyond the prisoner, and the prisoner, by way of "charging" the deceased, jumped in the air and struck him with his knee in the stomach. The two met, not directly, but at an angle, and both fell. The prisoner got up unhurt, but the

¹¹ Accord: *Commonwealth v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *State v. Newland*, 27 Kans. 764; *Rex v. Belingham*, 2 Car. & P. 234. At common law it was a crime for one to maim himself, or for another to maim him at his request; 1 East. P. C. 396, Co. Lit. 127a., *People v. Clough*, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

deceased rose with difficulty and was led from the ground. He died the next day, after considerable suffering, the cause of death being a rupture of the intestines.

Witnesses were called from both teams whose evidence differed as to some particulars, those most unfavorable to the prisoner alleging that the ball had been kicked by the deceased and had passed the prisoner before he charged; that the prisoner had therefore no right to charge at the time he did, that the charge was contrary to the rules and practice of the game and made in an unfair manner, with the knees protruding; while those who were favourable to the prisoner stated that the kick by the deceased and the charge by the prisoner were simultaneous, and that the prisoner had therefore, according to the rules and practice of the game, a right to make the charge, though these witnesses admitted that to charge by jumping with the knee protruding was unfair. One of the umpires of the game stated that in his opinion nothing unfair had been done.

BRAMWELL, L. J., in summing up the case to the jury, said: "The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts. Therefore, in one way you need not concern yourselves with the rules of football. But, on the other hand, if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act and you must find him guilty; if you are of a contrary opinion you will acquit him." His Lordship carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country, all of which were no doubt attended with more or less danger.

Verdict not guilty.

BARTELL v. STATE.

1900. SUPREME COURT OF WISCONSIN. 106 Wis. 342, 82 N. W. 142.

Error to review a judgment of the municipal court for the eastern district of Waukesha county: D. S. TULLAR, Judge. Affirmed.

Error to review a judgment rendered on a conviction of the plaintiff in error, King Bartell, of the offense of assault and battery.

Bartell claimed to be a magnetic healer, in the regular practice of his profession. He treated a young girl, about eighteen years of age, the person upon whom the offense was committed, at her request and with the sanction of her father. The girl was ignorant of what was necessary on her part in receiving the massage treatment, which was Bartell's method of operating. She was afflicted with some nervous trouble. Bartell went into a room alone with her, caused her to remove all of her clothing, and then, while her naked body was wholly exposed to his view, he gave her a massage treatment lasting some fifteen minutes. The evidence tended to show that after the treatment aforesaid Bartell caused the girl to sit on his lap and that he took some indecent liberties with her. The theory of the prosecution was that it was not necessary to the massage treatment that the girl should have exposed her person to Bartell's view, as she did under his direction; that she submitted to such direction solely because of her ignorance; that Bartell caused her to do so, not from the reasonable necessities of the case, but for his lewd personal gratification. The court submitted the case to the jury to find a verdict of guilty or not guilty, according as they should determine the question of whether Bartell fraudulently caused the girl needlessly to expose her person to his view for his lewd personal gratification, charging them that any touching of her body under such circumstances satisfied the requirements of the charge of the offense of assault and battery. The result was a verdict of guilty and judgment according.

MARSHALL, J.¹²—* * * Some criticism is made of the instructions given to the jury, but we are unable to discover any harmful error in them. The jury were told, in substance, and in language that could not reasonably have been misunderstood, that if Bartell treated his patient in good faith, for the purpose of curing the disease with which she was supposed to be afflicted, and in good faith caused her to expose her body to his view for the purpose of such treatment, his conduct did not constitute the offense of assault and battery; but if, on the other hand, he needlessly caused such patient to expose her person to his view for his evil purposes,

¹² Part of the opinion is omitted.

and she submitted because of her ignorance, and under those circumstances and for such purpose he secured the opportunity of laying his hands upon her body, he was guilty of the offense of assault and battery. There was no error in the charge so understood, and none would be claimed by counsel for the plaintiff in error. * * *

By the court—The judgment of the municipal court is affirmed.¹³

REGINA v. CLARENCE.

1888. CROWN CASE RESERVED. 16 Cox Cr. C. 511.

WILLS, J.,¹⁴ read the following judgment: The prisoner in this case has been convicted of "an assault" upon his wife, "occasioning actual bodily harm," under §§ 24 and 25, Vict., c. 100, § 47; and of "unlawfully and maliciously inflicting upon her grievous bodily harm" under § 20 of the same statute. The facts are that he was, to his knowledge, suffering from gonorrhoea; that he had marital intercourse with his wife without informing her of the fact; that he infected her, and that from such infection she suffered grievous bodily harm. The question is, whether he was rightly convicted upon either count. First, was he guilty of an assault? In support of a conviction it is urged that even a married woman is under no obligation to consent to intercourse with a diseased husband; that had the wife known that her husband was diseased she would not have consented; that the husband was guilty of a fraud in concealing the fact of illness; that her consent was therefore obtained by fraud and was therefore no consent at all, and, as the act of coition would imply an assault if done without consent, he can be convicted. This reasoning seems to me eminently unsatisfactory. That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract fraud does not destroy the consent; it only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked by the person defrauded, and it has

¹³ Accord: *Reg. v. Case*, 4 Cox Cr. C. 220; *Rex v. Rosinski*, 1 Moody 19.

¹⁴ The statement of facts, arguments of counsel, opinions of Smith, J., Stephen, J., Manisty, J., Pollock, B., Coleridge, C. J., concurring, of Hawkins, J., dissenting, and part of the opinions of Wills, J., and Field, J., are omitted. Matthew, J., Grantham, J., and Huddleston, B., concurred with the majority, and Charles, J., dissented, without opinions.

never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect, or there would have been no distinction between obtaining money under false pretences and theft. A second and far more effective way of stating the argument, however, is that connection with a diseased man and connection with a sound man are things so essentially different that the wife's submission without knowledge of the facts is no consent at all. It is said that such a case rests upon the same footing with the consent to a supposed surgical operation or to connection with a man erroneously supposed to be the woman's husband. In the latter case there has been great difference of judicial opinion as to whether it did or did not amount to the crime of rape; but as it certainly would now be rape by virtue of the Criminal Law Amendment Act, 1885 (48 and 49 Vict. c. 691, § 4), I treat it as so settled. A third way of putting the case is, that inasmuch as the act done amounts to legal cruelty according to the doctrines formerly of the Ecclesiastical Courts, and now of the Divorce Court, it can not be said to be within the consent implied by the marital relation. These different ways of putting the argument in favour of a conviction have some important differences. According to each the consent of the marital relation does not apply to the thing done—a fact as to which there does not seem to be room for doubt, and according to each the want of it makes the transaction an assault. According to the first it is the fraudulent suppression of the truth which destroys the consent *de facto* given, a proposition involving as a necessary element in the offence the knowledge of his condition on the part of the offender. According to the second, it is the difference between the thing supposed to be done and the thing actually done that negatives the idea of consent at all, and in that view it must be immaterial whether the offender knew that he was ill or not. According to the third, his knowledge is material, not on the ground of fraudulent misrepresentation, but because it is an element in legal cruelty as that term is understood in the Divorce Court. It makes a great difference upon which of these grounds a conviction is supported. Each of them covers an area vastly greater than the ground occupied by the circumstances of the present case. If the first view be correct, every man, as has been pointed out, who knowingly gives a piece of bad money to a prostitute to procure her consent to intercourse, or who seduces a woman by representing himself to be what he is not, is guilty of assault, and, as it seems to me, therefore, of rape. If the second view be correct, it applies in similar events just as much to unmarried as to married people, unless the circumstances should establish that the parties were content to take their chances as to their respective states of health; and the allegation that a man had given an assurance to a prostitute before having intercourse with her

that he was sound when he was not so in fact, might be a ground for putting him upon trial for rape. If the third view be correct, it places the married man, in the eye of the criminal law, in a much worse position than the unmarried, and makes him guilty of an assault, and possibly of rape, when an unmarried man would not be liable to the same consequences. * * * Where is the difference between consent obtained by the suppression of the fact that the act of intercourse may produce a foul disease, and consent obtained by the suppression of the fact that it will certainly make the woman a concubine, and while destroying her status as a virgin withhold from her the title and rights of a wife? Where is the distinction between the mistake of fact which induces the woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband but who is none? Many women would think that, of two cruel wrongs, the bigamist had committed the worse. These are but specimens of the questions which must be faced before the circumstances of the present case can be pronounced to constitute an assault. * * * If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible—a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. As between unmarried people this qualification will not apply. I can not understand why, as a general rule, if intercourse be an assault, it should not be a rape. To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent or even a distant approach to it. I greatly prefer the reasoning of those who say that, because the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me. I am well aware of the respect due to the opinion of the very learned judges from whom I differ; but I can not help saying that to me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. In other words, it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it, and an assault which includes penetration does not seem to me, under such circumstances, to be anything but rape. Of course, the thing done

in the present case is wicked and cruel enough. No one wishes to say a word in paliation of it. But that seems to me to be no reason for describing it as something else than it is, in order to bring within the criminal law an act which, up to a very recent time, no one ever thought was within it. If coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it can not the less be an assault because no mischief ensues to the woman, nor, indeed, where it is merely uncertain whether the man be infected or not. For had he disclosed to the woman that there might be the peril in question, she would, in most cases other than that of mere prostitution, have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal. In all cases, therefore, apart from the suggested impossibility of rape upon a wife, rape must be committed, and a great many rapes must be constantly taking place without either of the parties having the least idea of the fact. The question raised is of very wide application. It does not end with the particular contagion under consideration, but embraces contagion communicated by persons having small-pox or scarlet fever, or other like diseases quite free from the sexual element, and whilst so afflicted coming into a personal contact with others which would certainly have been against the will of those touched had they known the truth. * * * When the act of 1861 (24 and 25 Vict., c. 100) was passed, it had never occurred to any human being, so far as our legal history affords any clue, that the circumstances now under consideration constituted an assault. * * * Were it, however, possible that the mere words of the section would apply to the transaction in question, and that it were capable of being described as an assault, I am still of opinion that the context shows sexual crimes were intended to be dealt with as a class by themselves, the only rational way of legislating upon such a subject, and if the letter of the section could be satisfied by the present circumstances, there never was a case to which the maxim *qui haeret in litera haeret in cortice* more emphatically applied. I proceed to inquire whether the conviction under § 20 can be supported. That section says, "Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, with or without any weapon or instrument, shall be guilty of a misdemeanor, &c." * * * But I think the argument is even stronger here, for the context seems to me to show that direct personal violence of some kind was intended; so that, even if the constructive assault contended for by those who support a conviction under § 47 were established, a conviction under this section would still be wrong. I am of opinion, therefore, that the conviction should be quashed.

FIELD, J., read the following judgment: This indictment contains two counts expressed respectively in the actual words of §§ 20 and 47 of 24 and 25 Vict., c. 100, charging the prisoner under § 20 with "unlawfully and maliciously inflicting" upon his wife "grievous bodily harm"; and under § 47, with "an assault" upon his wife "occasioning actual bodily harm." The facts proved were, that the prisoner had sexual intercourse with his wife at a time when to his knowledge he was suffering from gonorrhoea, his wife being ignorant of this fact; that had she known of it she would not have consented to the intercourse, and that the result of the connection was to communicate to her the disease. The learned Recorder of London directed the jury that if those facts were established they might find the prisoner guilty on both or either of the counts. The jury found the prisoner guilty, and the learned Recorder has stated the case now before us, in which he asks the opinion of this court whether his direction was right in point of law, and whether upon these facts the prisoner could be properly convicted on both or either of the counts. The answer to this question depends on the true construction of the act under which the indictment was preferred, and on a consideration of the authorities, and I have come to the conclusion that the direction of the learned Recorder was right, and that the prisoner was properly convicted on both counts. The questions then are: First, Did the prisoner "unlawfully and maliciously inflict grievous bodily harm" on his wife; secondly, Did the prisoner "occasion bodily harm" to his wife by an "assault"? Now, it has long been established that a man who takes indecent liberties with a woman or has or attempts to have connection with her, may be properly convicted either of indecent assault or rape, which includes an assault, according to the circumstances of the case, if the acts were done without her consent, express or implied, or against her will. It is, I think, also clear that if the condition of the man is such that it is an ordinary and natural consequence of the contact to communicate an infectious disease to the woman, and he does so, he does in fact inflict upon her both "actual" and "grievous bodily harm." Such an act produces what a great authority, Lord Stowell, describes as "an injury of a most malignant kind" (see the note to *Durant v. Durant*, 1 Hagg. 768). It is also well settled that every sane man must be taken to intend the natural and reasonable consequences of his acts, and the intentional infliction of grievous bodily harm, unless justified or excused by law, is to my mind "malicious and unlawful." Thus far the case rests upon what seems to me to be known and generally adopted principles. But it is argued that here there is no offence because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then did the wife of the prisoner consent? The

ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from Hale's *Pleas of the Crown*, vol. 1, p. 629, was cited, in which it is said that a husband can not be guilty of rape upon his wife, "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband which she can not retract." The authority of Hale, C. J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime. Suppose a wife for reasons of health refused to consent to intercourse, and the husband induced a third person to assist him while he forcibly perpetrated the act, would anyone say that the matrimonial consent would render this no crime? And there is the great authority of Lord Stowell for saying that the husband has no right to the person of his wife if her health is endangered (*Poplin v. Poplin*, 1 Hagg. 765). It seems to me, however, unnecessary to decide that question in the present case, because the prisoner's wife undoubtedly did consent in fact to the act of intercourse, and therefore consented to all natural and ordinary attendant circumstances or consequences of the act, and also to such as were reasonably within her knowledge and contemplation. Had then the harm inflicted upon or occasioned to the prisoner's wife been one of the consequences of an ordinary natural and healthy connection, or had she known, or had reasonable grounds for thinking, that her husband was in a diseased condition, her consent to the consequences would, I think, be implied, and so no offence would have been committed. In the same way I think that, if a man knowingly consorts with a prostitute who gains her livelihood by promiscuous intercourse, it may be implied that he accepts all the consequences. Also, had the prisoner in this case not been aware of his condition, his act would not have been malicious or an assault, for, as he would have had no reason to suppose that his wife would do other than consent, he would have a right to act upon the implication, and I think therefore that, upon the construction which I am putting upon the act, there will be no danger of bringing within its definitions an injury caused by an innocent or merely thoughtless act of affection between husband and wife. But I have said that here there undoubtedly was consent on the part of the prisoner's wife to the act of intercourse, and it is now necessary to consider what were the actual circumstances attending this act of intercourse, and what was the nature and condition of the intercourse to which the consent was given. The actual circumstances were, that the prisoner, knowing he had a

foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited it. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances I think that her consent to the intercourse in fact was given upon the implied condition that to the knowledge of the prisoner the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, i. e., a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature, one which in all probability would communicate to her a foul disease, and to which the jury had found that she would not have consented had she known the state of his health. It seems to me therefore to follow that the mere consent of the prisoner's wife to an act innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did; and, moreover, that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease. Such an act between husband and wife is, I can not doubt, unlawful. In the Divorce Court it has been held that the wilful or reckless communication of disease by the one to the other amounts to legal cruelty, involving the liability to rescission of the marriage contract so far as regards cohabitation and intercourse (*Boardman v. Boardman*, L. Rep. 1 P. & M. 233). There was, I think, a clear duty cast upon the prisoner before he solicited the intercourse to communicate his condition to his wife, and the imposition of intercourse without such communication amounted to a false representation by act and conduct that he was in the same healthy and natural condition as he had been upon previous occasions of lawful intercourse. The result therefore at which I have arrived is, that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse, because, although he knew, yet his wife did not know, and he wilfully left her in ignorance as to the real nature and character of that act. This being so, it follows that there was both an assault and a criminal infliction of harm. I have arrived at this result by my own unaided construction of the statute and consideration of the law. * * * I think therefore that the conviction should be affirmed. I am desirous to add that my brother Charles concurs in this judgment.

Conviction quashed.¹⁵

¹⁵ See *Reg. v. Bennett*, 4 F. & F. 1105 referred to *supra*.

LOWE v. STATE.

1902. SUPREME COURT OF FLORIDA. 44 Fla. 449, 32 So. 956,
103 Am. St. 171.

Writ of error to Circuit Court, DeSoto County.

The facts of the case are stated in the opinion of the court.

CARTER, J.¹⁶—Plaintiff in error was at the fall term, 1899, of the circuit court of DeSoto county indicted for the larceny of a cow, the property of one Durrance. At the fall term, 1901, a trial was had resulting in a verdict against the defendant. From the sentence imposed he has taken writ of error to the present term of this court, and assigns as error the rulings of the court upon his demurrer to evidence and motion for a new trial, each of which were overruled, and exceptions noted. * * *

Some testimony was given at the trial, which the defendant contends proves that Durrance through certain agents consented to and arranged for the taking of his property by defendant (if it was taken by him), and therefore no larceny was committed. The authorities are abundant and the law unquestioned that a taking by the voluntary consent of the owner or his authorized servant or agent, even though with a felonious intent, does not constitute larceny. But where the criminal design originates with the accused, and the owner does not in person or by an agent or servant suggest the design, nor actively urge the accused on to the commission of the crime, the mere fact that such owner, suspecting that the accused intends to steal his property, in person or through a servant or agent, exposes the property or neglects to protect it, or furnishes facilities for the execution of the criminal design under the expectation that the accused will take the property or avail himself of the facilities furnished, will not amount to a consent in law, even though the agent or servant of such owner by his instructions appears to co-operate in the execution of the crime. 1 Bishop's New Crim. Law, § 362; *Alexander v. State*, 12 Texas 540; *Dodge v. Brittain*, Meigs (Tenn.) 84. See, also, note to *Connor v. State*, 25 L. R. A. 341, 36 Am. Rep. 295.

This statement of the law is deemed sufficient to guide the court below upon another trial without the expression of an opinion as to whether the testimony alluded to was sufficient to prove Durrance's consent to the taking of his property.

For the error found, the judgment of conviction is reversed and a new trial awarded.

¹⁶ Part of the opinion is omitted.

Section 5.—Entrapment.**STATE v. ABLEY.**

1899. SUPREME COURT OF IOWA. 109 IOWA 61,
80 N. W. 225, 46 L. R. A. 862, 77 Am. St. 520.

Indictment for breaking and entering a store building. From a judgment of conviction the defendant appeals.—Modified.

WATERMAN, J.¹⁷—The building entered was owned by the firm of Schaeffer & Reynolds. No question is made but that defendant broke and entered the store, and took goods therefrom; but it is claimed that he can not properly be convicted of the offense charged, because the entry was made with the assent of the owners or their agent. The facts upon which this claim is based are as follows: One Clock was marshal of the town in which the building was located. Prior to the commission of the crime, Clock (as he claims, for detective purposes) had been counseling and advising with defendant, not only in relation to this particular offense, but also as to the two breaking and entering other buildings. So zealous was the officer in this questionable line of duty and so anxious was he to impress defendant with the belief that he was earnest in his criminal intentions and would keep faith in the matters plotted, that Clock alone on one occasion broke and entered another store building, belonging to one Bryan, with a key furnished by defendant, and took from it some goods. Of course, he claims that this was done merely to lead defendant on. Clock testifies that the mayor of the town had previous information from him of defendant's intention to enter the Bryan store. The mayor, who was a witness, does not testify on this point; but, however that fact may be, Clock admits that Bryan, the owner, had no such information, and that the entry was effected without his knowledge or consent. One Will Reynolds, a clerk in the employ of Schaeffer & Reynolds, had a key to the building in question in this case. Shortly before the commission of the offense charged, Clock borrowed this key to get an impression from which defendant could make another key which would open the door, and such a key was afterward made by defendant. At this time Clock told Reynolds, the clerk, the use which he wished to make of the borrowed key, and also defendant's criminal purpose. The breaking and entering were done in the night time. During the day Clock had warned several citizens of

¹⁷ Part of the opinion is omitted.

the contemplated crime—among others, Schaeffer, a member of the firm which owned the store. He told Schaeffer that defendant had a key to the store, and would enter it that night. He did not, however, tell him where or how the key had been obtained. The persons so warned were requested to be on guard and assist in defendant's arrest after the offense was completed. This plan was carried out. Schaeffer and the others watched. Clock and defendant came upon the scene about midnight. Defendant opened the door and entered the store, Clock following. As they came out with the property taken, defendant was arrested.

One who has committed a criminal act is not entitled to be shielded from its consequences merely because he was induced to do so by another. If there is anything in the defense here, it must be because the entry was assented to by Schaeffer. But the evidence tends strongly to show that Schaeffer, though not objecting, did not personally assent. One who knows of a crime contemplated against him may remain silent and permit matters to go on, for the purpose of apprehending the criminal, without being held to have assented to the act. *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *State v. Adams*, 115 N. C. 775, 20 S. E. 722; *State v. Sneff*, 22 Neb. 481, 35 N. W. 220; *Thompson v. State*, 18 Ind. 386; *State v. Jansen*, 22 Kan. 498. The question of the owner's personal assent was left to the jury, and, we think, under instructions that fully and accurately stated the law. But certain instructions were asked by defendant and refused by the court, the thought of which was to predicate the assent of the owner upon the acts of the clerk, Reynolds. The evidence does not show on the part of the members of the firm any knowledge of Reynolds' conduct. Of course, if the clerk, with criminal intent, aided in any way in the entry of this building, he would be a party to the crime. But that is not what is claimed by defendant. He contends that if the clerk, though without criminal intent, assented the entry, such assent will be imputed to the master. Some text writers lay down the rule in terms broad enough to give support to this contention, and the following cases are cited by counsel as sustaining it. *Reg. v. Johnson*, 41 E. C. L. 123; *People v. Collins*, 53 Cal. 185; *Saunders v. People*, 38 Mich. 218; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106; *Allen v. State*, 40 Ala. 344. In the California case, the agent of the owner, who was pretending to take part in the burglary, alone entered the building, and the decision was founded on this fact. The other cases are each based upon one of two states of fact: Either the servant had custody of the building and a right to open it at the time he did, or at the time he assented thereto, or the owner was aware of the part the servant was taking and acquiesced therein. Neither of these conditions prevailed in the case at bar. It does not appear that Reynolds had charge of

the building, or had any right to admit persons therein, after it was closed for the night; and, as we have said, his conduct in the transaction with Clock was unknown to the owners. We do not think the clerk's conduct can be used as a shield for defendant. 1 Bishop Criminal Law (5th ed.), § 262; *State v. Jansen*, 22 Kan. 498. The instructions were rightly refused. * * *

We can not leave this case without again, in more emphatic terms, expressing our disapproval of the conduct of Clock, who, if he did not suggest, at least encouraged, the commission of the offense by defendant. We are inclined to doubt whether defendant, if left to himself, would have perpetrated the crime of which he has been convicted. Clock stimulated him with advice, aided him by acts, and, through unremitting effort, spurred him on to his undoing. This conduct was outrageous, if indeed, it was not criminal, and it is aggravated, rather than excused, by the fact that Clock was a peace officer. Frail human nature is prone enough to crime; it should not be purposely tempted; and in this case, it was urged to act. Defendant was sentenced to imprisonment in the penitentiary for a term of three years. In view of the facts, we shall reduce the term to six months. With this modification, the judgment will be affirmed.¹⁸

¹⁸ In *State v. Currie*, 13 N. Dak. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. 687, Morgan, C. J., says: "The authorities almost unanimously hold that a detective may aid in the commission of the offense in conjunction with the criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense. The defendant must act freely of his own motion, and if he so acts, the fact that the detective was not an accomplice in fact will not accrue to his benefit." If the owner of the building instigates the breaking in for the purpose of apprehending the criminal, it is held that the crime of burglary is not committed, the entry being with his consent; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Love v. People*, 160 Ill. 501, 43 N. E. 710; *Robert v. Territory*, 8 Okla. 326, 57 Pac. 840; nor is burglary committed where a servant, with the knowledge of his master, but apparently co-operating with the burglar, opens the door of the house; *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477; *Rex v. Eggington*, 2 B. & P. 508, 5 Rev. Rep. 689; see also, *People v. Collins*, 53 Cal. 185; but mere knowledge of the owner that the premises are to be entered, accompanied by non-action, is not a consent, nor a defense; *State v. Currie*, supra.

TONES v. STATE.

1905. COURT OF CRIMINAL APPEALS, TEXAS. 48 Tex. Cr. 363,
88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. 759.

HENDERSON, J.¹⁹—Appellant was convicted of robbery, and his punishment fixed at confinement in the penitentiary for a term of nine years; hence this appeal.

The state's case briefly stated is as follows: H. S. Rich was constable of precinct number 1, at Sherman, and Marion Nicholas was also a resident of Grayson county. Nicholas suspected that some robberies and violations of the local option law were being committed in the city of Denison. He conferred with Rich about the matter, and as a result of their conference, Rich agreed to get a man to see if he could not catch up with the parties committing said offense. He selected prosecutor Joe Richards, a painter and a resident of Sherman. On the day preceding the night of the alleged offense, these three parties met in Sherman and gave Richards \$40, \$38 of which was furnished by Nicholas and consisted of one \$10 bill, and five \$5, and three \$1 bills of United States currency. The numbers of all these bills were taken on a slip of paper by the parties at the time. Besides they were marked, and from some of the bills small portions were torn off. The remaining \$2 in silver was furnished by Rich, constable. It was understood that Richards was to go to Denison that night, buy all the whisky he could with the silver money, but was not to spend the currency. These bills were placed with him to be used to detect any parties who might rob prosecutor Richards, should he be robbed. In pursuance of this agreement Richards and Nicholas went that evening or night to Denison. After getting there Nicholas separated from prosecutor Richards. Richards immediately proceeded to the execution of the plan, went to several joints, drank some beer and a drink of whisky; and bought two pint bottles of whisky at two different joints. Subsequently he was seen on the street by appellant, who was a policeman of Denison, and by Finley, also a policeman. He was at the time either drunk or acting in a manner to suggest he was drunk. They accosted him and charged him with being intoxicated. He seems to have denied it, stating he could take care of himself and had money to pay his way, and that he was from the territory. They arrested him, however, and marched him to the jail, one on either side of him. When they got there, they took him inside, and stood him against the wall, held his arms up and searched him. They took from him the roll of currency bills before mentioned, 55

¹⁹ The statement of facts, arguments of counsel, and part of the opinion are omitted.

cents in silver, a pocketbook and the two pint bottles of whisky. They deposited with the jailer the two pints of whisky and the purse and 55 cents. The balance of the money they did not deposit. The next morning on complaint of Richards, appellant and his co-defendant Finley were arrested and searched. On appellant's person was found four \$5 bills, and one \$1 bill; and on Finley was found a \$10 bill and a \$5 bill and one \$1 bill. All of these bills were thoroughly identified by witness Rich as the same currency bills that he and Nicholas had given to prosecutor Richards on the evening before. All of said currency that had been given said Richards was found, except two \$1 bills not accounted for. Appellant denied that he got any money off of Richards on the night before, except the 55 cents, and claimed the money found on his person as his own property which he had borrowed on the day before from one Carver. Finley also denied that they had taken any money from Richards, except the 55 cents, and accounted for and claimed the money on his person as his own. It was also shown on the part of appellant that when they arrested the prosecutor, he claimed to have been robbed of his watch and some money in a house of prostitution in Denison. This is a sufficient statement of the case to discuss the legal questions presented.

We understand appellant's defense to embrace two propositions: First, that prosecutor was willing to be robbed, prepared himself for that purpose, made no resistance; and conceding that the money was taken from him, under the circumstances by the officers, that it was with his consent and so there could be no robbery. Second, that appellant and his companion Finley were police officers of the town of Denison; that they were authorized by ordinance to arrest persons found drunk in any public place in said city; that appellant was found in such condition by them, and they took him into custody, and carried him to jail; that they had a right to search him; that they used no violence in said search; and that in the absence of any violence used in procuring the money, conceding that they did procure it, this would not constitute robbery. Furthermore, if it be admitted that sufficient violence was shown in taking the money still no intent was shown to appropriate it, and if subsequently they formed the intent and did appropriate said money, it would not constitute robbery.

On the first proposition, appellant has cited a number of authorities, from which he deduces a principle of law, as follows: Where money is placed upon a person with the purpose of being taken from him, in order to detect a criminal, the owner of the money and the person from whom the money is taken consenting thereto, robbery is not committed. The authorities cited in support of this proposition are *Spiden v. State*, 3 Texas Crim. App. 156; *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295; *State v. Hayes*, 105

Mo. 76, 24 Am. St. 360; *McGee v. State*, 66 S. W. 562. Notes to *Allen v. State*, 91 Am. Dec. 477; note to *State v. Hull* 72 Am. St. 694. Of course, if it be conceded that the evidence shows the prosecutor was consenting to the robbery, then the application of the authorities cited may be granted. However, we gather from the authorities cited by appellant, and others, that as to the offense of burglary, larceny, robbery, and other crimes of like character, if the owner of the burglarized premises, or property invites a crime, or induces parties to commit an offense in order that they might be apprehended, that he can not afterwards be heard to say that he did not consent to what was done. It was so held in *Allen's* case; the principle is further extended by some of the cases, that where the owner of the premises sought to be burglarized, authorizes his servant to act with the accused, and under the owner's direction unlocked the door of the premises said to be burglarized, and entered the premises with the accused, this was held not to be burglary, because of his consent. In *Spiden's* case, which was the alleged burglary of a bank in Dallas, it appears that the owners set on foot the design to have the bank burglarized, and had detectives go in with the burglars. In that case, it was held there was consent. But we do not believe it is held by any well considered authority, that where a person has learned of plans to burglarize his premises, and does not at all, enter into the designs of the burglar, but does not try to prevent the burglary, on the contrary lays plans to entrap the burglar, and does apprehend him in the act, there is no consent to the burglary and the burglar is amenable to punishment. *Robinson v. State*, 34 Texas Crim. 71; *Thompson v. State*, 18 Ind. 386; *State v. Sneff*, 22 Neb. 481. And we understand the same principle is announced in *Alexander v. State*, 12 Texas 540; *Pigg v. State*, 43 Texas 108; *Johnson v. State*, 3 Texas Crim. App. 590; 1 Bishop Crim. Law, § 262. In *Alexander's* case, Judge Wheeler cites with approval the principle laid down in 3 Chitty's Crim. Law, page 952, as follows: "If the owner in order to detect a number of men in the act of stealing, directs a servant to appear and to encourage the design and leads them on until the offense is completed, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of the thieves will not be destroyed." In 2 Russell on Crimes, page 113, citing 1 Foster, page 129, he refers to a case very much in point and illustrative of the principle of law here involved. We quote as follows: "One Norden having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavors to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, until the highwayman came up to the company in the

coach and to him, and to them presented a weapon demanding their money. Norden gave him the little money he had about him, and then jumped out of the chaise with a pistol in his hand, and with the assistance of some others took the highwayman. This was holden to be a robbery of Norden." It occurs to us that the facts of this case come within the principle of the above case. Here there was no agreement between prosecutor Richards and appellant that he would submit to a robbery, as was the case in *Rex v. McDaniel*, 1 Foster's Rep. 121, 128. Nor was there any invitation on his part, much less was there any device to lead appellant to the commission of the offense. While he anticipated, like Norden, that he might be robbed, he made no agreement with the robbers in that regard. Apprehending that he might be robbed, he had a perfect right to prepare himself beforehand, in order that he might detect the persons guilty of the robbery, and this we understand to be all that he did. Under the authorities this is not consent to the robbery in such measure as to absolve appellant from criminality. * * * There being no errors in the record, the judgment is affirmed.

Affirmed.²⁰

PEOPLE v. CONRAD.

1905. APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK.
102 App. Div. 566, 92 N. Y. S. 606.

Appeal by the defendant, Edward E. Conrad, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York in favor of the plaintiff, entered the 8th day of April, 1904, convicting the defendant of the crime of attempting to commit the crime of abortion.

HATCH, J.²¹:

The conviction of the defendant was brought about by means of a trap arranged by the officers of the county medical society. It is claimed that as the defendant was lured into the commission of the claimed overt acts, he can not be punished therefor. This contention has recently been the subject of examination by this court and by the Court of Appeals, and decided adversely to the contention of the defendant. He was not a passive instrument in the hands of the entrapping parties. He did the act with which he was charged voluntarily, with full knowledge of the subject and of the consequences which would flow therefrom. Under such circumstances setting a trap by which he was caught is not a defense. (People

²⁰ For a useful collection of authorities on the subject of entrapment see the note in 25 L. R. A. 342.

²¹ Part of the opinion is omitted.

v. Mills, 91 App. Div. 331; *affd.* on appeal, 178 N. Y. 274.) The evidence upon the trial tended to show that one Minnie Levine, after a conversation with one Andrews, the attorney for the county medical society, visited the defendant at his office, 127 West Forty-seventh street, on February 2, 1904. She informed the defendant that she was in the family way; that she had one child, thirteen months of age, and did not have sufficient means to support another; that she did not want to have any more children and asked him how much he would charge for an operation upon her person. Defendant asked if she wanted to come to his house and she told him that she would rather not because she would be likely to be missed away from home. The defendant then told her to call again the next day. Upon the following day this woman called upon the defendant in company with a Mrs. Blocher, the wife of a detective, who had also previously acted as a detective in other matters, and was being paid a consideration for her services in this case. This woman was introduced by Mrs. Levine as her sister-in-law and represented that she lived at 14 West Sixty-fifth street, in the city of New York, where a flat had been engaged. In fact she lived at 518 Lexington avenue, Brooklyn. These two women testified to a further conversation respecting the performance of the operation, and finally the defendant agreed to perform it for \$125—\$100 for himself and \$25 for the nurse, and he was to go to 14 West Sixty-fifth street, where the Blocher woman was represented to live. At about eleven o'clock on the twelfth day of February following these interviews the defendant sent a nurse to the house, No. 14 West Sixty-fifth street. She prepared a table for an operation by arranging blankets, sheets and pillows upon it, procured some water to be boiled upon the stove, to be used for purposes of sterilization; caused Mrs. Levine to remove her clothing and put on a night-dress. At this time two detectives, O'Connell and Reardon, were concealed in a bedroom in this flat adjoining the room where the nurse had prepared the table. About twelve o'clock the defendant arrived, carrying a bag, from which he produced and placed upon a chair near the table a case of instruments, consisting of a pair of scissors, three rubber bougies, a sound or probe, a speculum, a bottle of gauze, two bottles, one containing white tablets, a pair of dressing forceps, a cloth strap and a rubber bag. It was shown by competent testimony that Mrs. Levine was about four or five months pregnant with a living child. Shortly after the arrival of the defendant at the flat, Mrs. Blocher produced and paid him \$125 in bills, which were marked. Thereafter the defendant placed Mrs. Levine upon the table, drew up her legs so that her knees rested upon her chest, and strapped her in a position known to the medical fraternity as the "dorsal" or "lithotomy" position. Having thus placed her, he sterilized his instruments and hands by means of the

boiling water, and proceeded to use a syringe for cleansing the person of the woman. It had been arranged between the concealed detectives and Mrs. Levine that the latter should give a signal when they were to come in and interrupt the process. After having syringed the parts, the defendant took in his hands a speculum, which was used for the purpose of enlarging the vagina and enabling the operator to obtain a view of the womb. With this speculum in his hand the defendant turned toward the woman, when the signal was given, the detectives entered the room, placed the defendant under arrest, demanded that he deliver to them the \$125 in bills, which he did, and at their request he gave them the names of all his instruments; the woman was unstrapped and left the table, and the defendant was removed under custody.

It sufficiently appeared from the evidence that the instruments which the defendant produced and laid upon the chair and sterilized could be used to perform an abortion. Upon such subject the People were held to an extremely rigid rule of evidence, but sufficient appeared to show that the position in which the woman was placed and the instruments produced, if used in ordinary course to final consummation, would have resulted in producing an abortion. There is no conflict in the evidence with respect to what the defendant did. The dispute comes to rest upon the character of the act and the purpose and intent which the defendant had in doing it. The defendant denied that he did any of the act with intent to commit an abortion upon the person of the woman. He denied in terms that he had ever been applied to for any such purpose, but claimed that the woman applied to him for treatment for an abscess or other disorder of her private organs, and that it was for that purpose, and that alone, that he was engaged in treating her; that all the acts which he did were proper and appropriate for such treatment; that he had no knowledge as to whether the woman was pregnant or not, or what the nature of her disorder was at any time, and that his examination had not progressed sufficiently far to enable him to determine whether the woman was pregnant or what the nature of the disorder was when he was arrested. We have carefully gone over the testimony and reached the conclusion that the evidence was sufficient to justify the jury in finding against the defendant upon this issue; that the question thus presented became one of fact, and the evidence is sufficient to support the verdict which was based thereon. * * *

The judgment of conviction seems to have been justified by the evidence, and as no errors of law appear, it should be affirmed.

Van Brunt, P. J., Ingraham, McLaughlin, and Laughlin, JJ., concurred.

Judgment affirmed.²²

²² Affirmed without opinion in 182 N. Y. 529.

Section 6.—Condonation.**STATE v. NEWCOMER.**

1898. SUPREME COURT OF KANSAS. 59 Kan. 668, 54 Pac. 685.

JOHNSTON, J.²³—O. L. Newcomer was prosecuted upon the charge of feloniously having had sexual intercourse with Bertha Ickes, an unmarried female under the age of eighteen years. A conviction followed, and sentence of the court was imprisonment in the penitentiary for a term of five years. It appears that shortly after the act of intercourse the defendant was arrested upon a charge of rape, committed on February 20, 1897; but the parties interested were brought together, and it was agreed that a marriage should take place between the defendant and Bertha Ickes, and that the prosecution should be discontinued. The marriage occurred and the prosecution was dismissed, and the costs of the same taxed to the defendant. They lived together as man and wife until after the birth of the child, which occurred October 12, 1897. During that time he had employment in the community where they lived, and his earnings were largely used in providing a home, and in the protection and support of his wife. After the birth of the child, and about the first of November, he obtained a situation as telegrapher at Enterprise, Kansas; and he states that shortly after going there, reports reached him that his wife had had improper relations with another young man prior to his marriage, and that the child was not his own. On November 25, 1897, he wrote a letter to his wife's father, calling his attention to the reports which had reached him, and stating that he did not intend to longer live with her.

Soon after the receipt of this letter, the father of his wife instituted the present proceeding, by filing a complaint charging the defendant with having had unlawful and felonious intercourse with Bertha Ickes on February 9, 1897. * * *

In behalf of the defendant it is argued that the evil consequences of the unlawful act have been averted by the marriage; that when the parties to the act voluntarily, and in good faith, entered into the marriage relation, the offense was condoned, and that the welfare of the parties and their offspring requires and the interests of the public will be best subserved by the ending of the prosecution.

The difficulty with this contention is that the law does not provide that the offense may be expiated by marriage or condoned by the injured female. Her consent to the sexual act constitutes no defense, and neither her forgiveness nor anything which either or both will do, will take away the criminal quality of the act or relieve the defendant from the consequences of the same. The principle of

²³ Part of the opinion is omitted.

condonation which obtains in divorce cases where civil rights are involved has no application in prosecutions brought at the instance of the state for the protection of the public and to punish a violation of the law. It is true, as stated, that society approves the act of the defendant, when he endeavors to make amends for the wrong done the injured female, by marrying her, and usually a good faith marriage between the parties to the wrong prevents or terminates a prosecution; but the statute which defines the offense and declares punishment therefor, makes no such provision. If the defendant has acted in good faith in marrying the girl, and honestly desires to perform the marital obligations resting upon him, and is prevented from doing so by the influence and interference of persons other than his wife, it may constitute a strong appeal to the prosecution to discontinue the same, or to the Governor for the exercise of executive clemency, but as the law stands it furnishes no defense to the charge brought against the defendant.

The judgment of the district court will be affirmed.²⁴

DEAN v. STATE.

1896. SUPREME COURT OF INDIANA. 147 Ind. 215, 46 N. E. 528.

MONKS, J.²⁵—* * * By the tenth instruction the court informed the jury that if they had a reasonable doubt as to whether appellant tendered Mrs. Newton the money or property back before the filing of the affidavit and information, that they could not convict him of embezzlement. And that a tender after the commencement of the action would be no defense. Appellant has no just ground to complain of this instruction. The error, if any, committed, was in his favor. If appellant had committed the offense of embezzlement charged, he could not, after the offense was committed, avoid the crime committed or bar a prosecution therefor by a tender back of the money or property embezzled, even though such tender was made before the filing of the affidavit and information charging the offense. Neither would a tender after the commencement of the prosecution have such effect. As was said in *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991: "It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar prosecution by indictment and conviction for such larceny or embezzlement."

It is not within the power of any one who commits a crime, by

²⁴ Accord: *State v. Fowler*, 13 Idaho 317, 89 Pac. 757; *Commonwealth v. Slaterry*, 147 Mass. 423, 18 N. E. 399. See also, *Smith v. State*, 44 Tex. Cr. 137, 68 S. W. 995, 100 Am. St. 849.

²⁵ Part of the opinion is omitted.

restitution, payment or otherwise, before or after the commencement of the prosecution, to take away the right of the state to insist upon a conviction for the crime committed. *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *State v. Pratt*, 98 Mo. 482, 11 S. W. 977; *People v. DeLay*, 80 Cal. 52, 22 Pac. 90; *State v. Tull*, 119 Mo. 421, 24 S. W. 1010; *Commonwealth v. Tenney*, 97 Mass. 50; *State v. Leicham*, 41 Wis. 565. * * *

Finding no error in the record, the judgment is affirmed.²⁶

Section 7.—Contributory Negligence.

STATE v. MOORE.

1906. SUPREME COURT OF IOWA. 129 Iowa 514, 106 N. W. 16.

The defendant was indicted for the murder of one Thomas M. Winnemore. There was a verdict and judgment of guilty of manslaughter, and the defendant appeals.—Affirmed.

WEAVER, J.²⁷—The defendant was a professional horse breaker or trainer and on the day of the alleged offense was engaged in that work in the city of Muscatine, Iowa. A horse having escaped from his control in the public street, appellant procured another horse, which he mounted and rode off in pursuit. The fleeing animal took a route leading along the street on which Winnemore resided, closely followed by the appellant. Winnemore, a man considerably advanced in years, was on or near the sidewalk and as the chase approached he went out into the roadway, and by flourishing his cane sought to stop the horse, which swerved to one side and passed by him. The deceased then turned to go back upon the sidewalk, when he was struck by the horse ridden by the appellant and knocked to the ground, receiving injury from which he soon died. Based upon this occurrence, the appellant was indicted and put upon trial for murder. At the close of the testimony the court instructed the jury that there was not sufficient evidence of malice to sustain the charge of murder, but submitted the case for

²⁶ Condonation or settlement with the injured party is not a defense; *Williams v. State*, 105 Ga. 606, 31 S. E. 546, (false representations); *State v. Tull*, 119 Mo. 421, 24 S. W. 1010, (forgery); *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 77, (seduction); *Commonwealth v. Brown*, 167 Mass. 144, 45 N. E. 1, (false representation); *State v. Merkel*, 189 Mo. 315, 87 S. W. 1186, (embezzlement); except in case of misdemeanors, where compromise is often permitted by statute; *Stattam v. State*, 41 Ga. 507; *Commonwealth v. Carr*, 28 Pa. Super. Ct. 122; *People v. Bishop*, 5 Wend. (N. Y.) 111.

²⁷ Part of the opinion is omitted.

a verdict upon the charge of manslaughter, which crime it defined for the purposes of the case as "the killing of a human being through a grossly negligent and reckless act, intentionally done by another." * * *

It is again said that, in order to convict the defendant of negligently and recklessly causing the death of Winnemore, the state should have negated contributory negligence on the part of the latter. It is enough to say that contributory negligence, if shown, is never a defense or excuse for crime, nor can it in any degree serve to purge an act otherwise constituting a public offense of its criminal character. The defendant was not indicted for a crime or offense against Winnemore, but against the state. When the administrator of the estate of the deceased brings action to recover damages, the opportunity will be afforded to consider the question of contributory negligence. Counsel do not cite us to any authority supporting the proposition they here rely upon, and we feel very certain that none can be found. * * *

The judgment of the district court is affirmed.²⁸

Section 8.—Guilt of Injured Person.

GILMORE ET AL. V. PEOPLE.

1899. BRANCH APPELLATE COURT, SECOND DISTRICT.
87 Ill. App. 128.

Mr. JUSTICE DIBELL delivered the opinion of the court: * * *

* * * The case which the state sought to prove was in part as follows: Chisholm and Hileman were men of some wealth, living in Carroll county. Taber and Klein also lived in that county. Munger, Romaine and Gilmore lived in Chicago. Gilmore was an attorney. Romaine was represented to be a telegraph operator. It was represented to Chisholm and Hileman that Munger and Romaine had a scheme for tapping telegraph wires running to a pool room in Chicago, and conducting the wires into a room near by, intercepting and delaying reports of horse races, till one of them could go to the local pool room and bet on the winning horse; then sending on the report and winning large sums of money; that they had bought and partly paid for the necessary machinery, but needed \$337.50 more to enable them to complete the arrangements, and wanted some one to go in with them, furnish the remaining money needed, and share in the profits. Chisholm and Hileman accepted the offer

²⁸ Accord: Reg. v. Longbottom, 3 Cox. Cr. C. 439.

and furnished the required money. Then followed, during the next twenty-five or thirty days, numerous calls for more money on various pretexts, such as that the machinery had been burnt out by an unusual charge of electricity upon the wires; that a "resister" was required; that the telegraph company had run a second wire to the pool room and sent part of the report over one wire and part over the other, and hence the machinery must be duplicated, etc. Chisholm and Hileman responded to these various demands, and prior to April 20th they had paid out \$2,600. Then they were notified that Munger and Romaine, who were known in these transactions as Vaughn and Martin, had been arrested by the police on a charge of tapping telegraph wires, in violation of the statute, and were confined in the central station, Chicago, and the machinery had been seized; that a lawyer named Gilmore had been hired and paid \$100 to defend them, and that \$500 was needed to get them out on "straw bail." Chisholm and Hileman furnished the money, and were afterward notified that Munger and Romaine had been released. Gilmore and Romaine then came to Carroll county and had an interview with all the parties, except Munger. Gilmore stated that the offense of tapping wires was punishable by imprisonment in the penitentiary or a heavy fine; that the possession of the machinery by the police, which he said was at the central station, furnished serious evidence against them all; that that was all the evidence the police had, and if they could get the machinery back it would destroy all evidence of guilt; that he thought he could buy off the police, get the machinery back, and square everything, for about \$2,000; and Romaine stated that the machinery could be returned to the house from which it was bought at a discount of ten or twenty-five per cent., so that there would be no great loss. Gilmore returned to Chicago to ascertain the exact amount required, and wired back it would take \$2,100. * * * The \$2,100 was not paid, but this prosecution was instituted. It was shown that Munger and Romaine had never been confined in the central station, either under their own names or the names Vaughn and Martin, nor had any such machinery been there; that wire-tapping machinery of the kind described would cost but a few dollars, and that the most expensive machinery would not have cost over \$350. There was evidence slightly tending to show that wires were in fact tapped and two bets on horse races made, and counter evidence casting much doubt upon the existence of any wiring, tapping or betting by any of these parties. * * *

The defense asked instructions based upon the theory that if Chisholm and Hileman were engaged in a criminal transaction with defendants, and in that transaction defendants cheated Chisholm and Hileman and defrauded them of their money, then the defendants could not be convicted. These instructions the court refused.

The state asked instructions based upon the contrary doctrine, that the fact that Chisholm and Hileman were engaged in a criminal transaction with defendants would not exonerate defendants if they had committed against Chisholm and Hileman the crime charged in the indictment. These instructions the court gave. The rule contended for by defendants is based chiefly upon the majority opinion in *McCord v. People*, 46 N. Y. 470, and upon *State v. Crowley*, 41 Wis. 271. In the former the rule was thus stated:

"Neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose, are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods."²⁹

We entirely approve the doctrine as applied to a civil suit between rogues for contribution or reimbursement, but we think it has no proper application to a criminal prosecution against one of several wrongdoers for a crime committed against a fellow-criminal. Though the aggrieved fellow-wrongdoer may be the one who makes the complaint, yet it is not necessary that he seek or desire the prosecution. Any one who knows that a crime has been committed may initiate the prosecution. The complaining witness, whether he is or is not the person defrauded, can not control or settle or abandon a prosecution once begun. The proceeding is not one to enforce civil rights. It is a prosecution of the crime of the public wrong done to the people generally by the violation of a public law. The people are entitled to have the criminal punished on public grounds, for the suppression of crime and for the protection of the public against other like crimes, no matter how unworthy the source from which the proof may come. One crime can not be permitted to become a shield against the punishment of another crime. One who has committed a crime ought not to escape punishment by showing that another person ought also to be punished for the same or another crime. Public policy requires that both be punished, and not that both be permitted to escape because of their mutual relations. These views find full expression and illustration

²⁹ The decision in *McCord v. People* was followed in *People v. Livingstone*, 47 App. Div. (N. Y.) 283, 62 N. Y. S. 9, with reluctance, but subsequently, by the Laws of 1907, ch. 581, § 1, the following provision was added to the Penal Code of New York: "Hereafter it shall not be a defense to a prosecution for larceny, or for an attempt or conspiracy to commit the same, or for being accessory thereto, that the purpose for which the owner was induced by color or aid of fraudulent or false representation or pretense, or of any false token or writing, to part with his property or the possession thereof, was illegal, immoral, or unworthy." Penal Law, § 1290.

in *People v. Hensler*, 48 Mich. 49; *People v. Watson*, 75 Mich. 578; *Commonwealth v. Morrill*, 62 Mass. 571; *Patterson v. State* (N. J.), 40 Atl. 773; *In re Cummins*, 16 Colo. 451. We are of opinion these cases rest on sound legal principles and state a salutary rule. See also the dissenting opinion of Peckham, J., in *McCord v. People*, *supra*. This precise question seems not to have been decided in this State, but a conviction was sustained in *Maxwell v. People*, 158 Ill. 248, where the prosecuting witness was cheated while he was, as he supposed, assisting the defendant in cheating another person. We approve the rulings of the trial court on this subject.³⁰ * * *

³⁰ Part of the opinion is omitted. Accord: Holding that the equal guilt or fault of the injured party is not a defense; *Nation v. District of Columbia*, 34 App. D. C. 453; *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386; *People v. Watson*, 75 Mich. 582, 42 N. W. 1005; *Cunningham v. State*, 61 N. J. L. 67, 38 Atl. 347; 61 N. J. L. 666, 40 Atl. 696; *Commonwealth v. Morrill*, 8 Cush. (Mass.) 571; *Reg. v. Hudson*, 8 Cox Cr. C. 305.

CHAPTER X.

PARTIES IN CRIME.

Section 1.—Principals.

"A man may be principal in an offense in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done. Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it, who is ignorant of its poisonous quality, or giving it to him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold with regard to other murders committed in the absence of the murderer by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed, letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues; in every one of these cases the party offending is guilty of murder as a principal, in the first degree. For he can not be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman can not be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and can not be so as accessory, it follows that he must be guilty as principal, and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist." 4 Black. Com. 34, 35.¹

¹ In modern times there is no practical difference between principals of the first and second degrees; *Williams v. State*, 47 Ind. 568; *State v. Green*, 4 Strob. (S. Car.) 128 note, and *Commonwealth v. Knapp*, supra. As Bishop has pointed out (see *Bishop's New Criminal Law*, 8th ed., § 648), by the old common law only those were principals who did the criminal act personally, or through an innocent agent, while those present aiding and abetting were accessories at the fact. Subsequently the latter were also made principals, and called principals in the second degree.

STATE v. BAILEY.

1908. SUPREME COURT OF APPEALS OF WEST VIRGINIA.
63 W. Va. 668, 60 S. E. 785.

Error to Circuit Court, Mingo County. Halsey Bailey was convicted of larceny, and he brings error. Reversed. Remanded.

Poffenbarger, President²:

* * * The following material facts might be found from the evidence: Sig. and Sol H. Freiberg had thirty barrels of whisky in the bonded warehouse of the Tug River Distilling Company at Williamson, Mingo county, on which they had paid the internal revenue tax at the rate of \$1.10 per gallon, and four of which were hauled away by one James Blackburn, an employee of the Mingo Light and Ice Company, by direction of White Atkinson, one of the proprietors of that concern, pursuant to a request of the prisoner that he take them into his possession and care. At that time the distilling company was in the hands of a receiver, and there was a controversy between the receiver and the Freibergs concerning the title of the property or the right of the latter to remove it. The prisoner was the president of the distilling company and, as such, was interested in the controversy. * * * The prisoner was not present at the time it was taken away, but was either at Huntington, about 100 miles distant, or on the road to that place. However, he does not deny having directed Atkinson to take it and he virtually admitted his knowledge of its whereabouts when the officers were searching for it. This admission, however, was coupled with the statement that he thought it belonged to him, and, if he found that it did not, he would return it. While at Huntington or on his way to that place, he did nothing concerning the property taken, nor did he, at any time, have any of it in his actual possession or aid in the removal of it from the distillery. * * *

Since the jury could have found a larceny of the whiskey, and also, that some of the parties above named were guilty, they were bound to determine which of them was the principal; for there can be no crime without a perpetrator nor an accessory without a principal. If Atkinson and Blackburn, the parties who actually took the whiskey, had no criminal intention in doing so, and took it by direction, or at the instance of another party, such other party is, *ex necessitate legis*, the principal, though he was not present at the time and place of the taking either actually or constructively. The law does not justify or excuse an act which makes the intentional perpetrator thereof guilty of a felony, by denying or withholding

² Part of the opinion is omitted.

remedy for the vindication of the peace and dignity of the state, by reason of the peculiar circumstances under which, or the means by which, it was accomplished. If the party who actually did the act was innocent of intentional wrong, and the act on his part was by procurement of another, it imputes the criminal intent to that other and makes him the guilty party, although he was not in any sense an accomplice, co-conspirator, or aider and abettor of the actor. The relation of the parties to one another and to the act is such as to create an exception to the general rules of law respecting principals and accessories. If the circumstances show that the crime has been committed and the actor was innocent of intention to do wrong, he is treated as a mere instrument or agency in the hands of him who procured or induced his act. He is neither principal nor accessory, nor guilty of any crime or offense. From necessity, therefore, the other party must be the perpetrator of the crime, no matter where he was. Bish. New Crim. Law, § 310, says: "The doctrines of this sub-title explain how it is that the books speak of the crimes being committed through an 'innocent agent.' Such an agent is one who does the forbidden thing moved by another person, yet incurs no legal guilt because either not endowed with mental capacity or not knowing the inculpatory facts." At § 649 the same author says: "There may be more principals than one, but there must be at least one. Consequently a man from whose sole and unaided will comes a criminal transaction is principal, whatever physical agencies he employs, and whether he is present or absent when the thing is done." At § 651 he says: "Since there must always be a principal, one is such who does the criminal thing through an innocent agent while personally absent. For example, when a dose of poison, or an animate object like a human being, with or without general accountability, but not criminal in the particular instance, inflicts death or other injury in the absence of him whose will set the force in motion, there being no one but the latter whom the law can punish, it of necessity fixes upon him as the doer. But if the agent employed incurs guilt, then the employer is simply an accessory before the fact." A good illustration is found in *Gregory v. State*, 20 Ohio St. 510, 20 Am. Rep. 774. Gregory had induced Bevis's daughter to sign her father's name to a promissory note, by false pretences and representations which led her to believe that she had authority to do so, and the court held that the evidence warranted the jury in finding the daughter innocent of wrong intention and the defendant, Gregory, guilty of forgery. In that instance, the defendant was present when the criminal act was done, but did not participate in it otherwise than by requesting the signing of the note and representing authority in the daughter to sign it. But, in *Adams v. The People*, 1 Comst. (N. Y.) 173, a resident of Ohio obtained money from a firm in

New York by causing fraudulent and fictitious receipts to be exhibited to it by a third party. The receipt was drawn and signed in Ohio and the offense committed in the City of New York, through the instrumentality of an innocent agent, who obtained the money for his principal by presenting the fictitious receipt, under the belief that they were genuine. The agent was innocent and his principal was held guilty, although the offense was committed in New York and he was, at the time, in the state of Ohio. The same principle was applied in *Regina v. Bannen*, 1 C. & K. 295, in which the defendant had procured a die-sinker to make dies with which shillings could be counterfeited, by representing to him that they were for use in whist clubs. In *Regina v. Bleasdale*, 2 C. & K. 765, the defendant was convicted of the larceny of coal from the premises of other persons, which, by his direction, his servants and agents had severed and carried away, and the syllabus in that case declares as follows: "If a man does, by means of an innocent agent, an act which amounts to a felony, the employer, and not the agent, is accountable for that act." In *Regina v. Clifford*, 2 C. & K. 202, an innocent agent, at the request of the prisoner, had written "William Smart" to a receipt on a postoffice money order, believing he had authority to do so. Platt, Baron, said: "We agree in thinking that, as Bartlett was an innocent agent, the signing the name William Smart by him is just the same as if it had been signed by the prisoner himself, and that it is therefore a forgery." * * *

In view of this evidence tending to show actual guilt on the part of persons other than the prisoner, the absent instigator of the taking, the court could not by any instruction given, preclude inquiry by the jury as to their guilt or innocence, without injury to the prisoner. It may be insufficient to warrant the court in saying, as matter of law, the latter was an accessory before the fact and not a principal, but it was amply sufficient to call for the deliberation and action of the jury upon the hypothesis of guilt in those who did the actual taking or some of them, and consequent innocence of the prisoner as a principal.³ * * *

COMMONWEALTH v. KNAPP.

1830. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
9 Pick. (Mass.) 496, 20 Am. Dec. 491.

John Francis Knapp was indicted as principal, together with Joseph Jenkins Knapp and George Crowninshield as accessories, in

³ Accord: Holding that one who procures a crime to be committed through an innocent agent is liable as a principal, though not present; *Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 90 Am. St. 340; *State v. Learnard*, 41 Vt. 585, (infant under duress); *Commonwealth v. Hill*, 11 Mass. 137, (ignorant infant); *Maxey v. United States*, 30 App. D. C. 63.

the murder of Joseph White of Salem, which was perpetrated on the 6th of April, 1830. The indictment alleged that Richard Crown-inshield also was a principal, and that he had committed suicide. The parties indicted were tried separately. * * *

PUTNAM, J., delivered the opinion of the court.⁴ By the most ancient common law, as it was generally understood, those persons only were considered as principals in murder who actually killed the man, and those who were present, aiding and abetting, were considered as accessories. So that if he who gave the mortal blow were not convicted, he who was present and aiding, being only an accessory, could not be put upon his trial. But the law was otherwise settled in the reign of Henry IV. It was then adjudged that he who was present, aiding and abetting him who actually killed, was to be considered as actually killing, as much as if he himself had given the deadly blow. * * *

PUTNAM, J., in behalf of the whole court instructed the jury as follows: There is no evidence that the prisoner gave the mortal blows with his own hand; but it is contended on the part of the government that he was present, aiding and abetting the perpetrator at the time when the crime was committed. We are therefore to consider what facts are necessary to be proved to constitute him who is aiding and abetting to be a principal in the murder: or, in other words, what, in the sense of the law, is meant by being present, aiding and abetting.

It is laid down in Foster's Crown Law, 349, 350, Discourse 3, § 4. "When the law requireth the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth.⁵ Several

⁴ Part of the opinion is omitted.

⁵ In *State v. Hamilton, et al.*, 13 Nev. 386, the defendant, Laurie, was convicted of assault with intent to commit robbery. Beatty, J., in his opinion saying: "The motion to discharge Laurie having been overruled, he requested the court to give the following instruction, which was refused: 'The jury is instructed that if they believe that an attempt was made to rob, as alleged in the indictment, and that at the time such attempt was made the defendant, Laurie, was in Eureka county, Nevada, then they cannot convict him.'" * * *

"We will suppose that if it [the evidence] tended to prove that a plan was conceived between Hamilton, Laurie and others, to rob the treasure-box of Wells, Fargo & Co., on the road from Eureka to some point in Nye county; that the part of Laurie was to ascertain when the stage left Eureka, and to make a signal to his confederates by building a fire on top of a mountain in Eureka county, which could be seen by them from a point in Nye county, thirty or forty miles distant; that he did inform himself of the departure of the messengers with the treasure; that he gave the concerted signal; that Hamilton and Davis thereupon attacked the stage; that Davis was killed and one of the messengers wounded, and that the robbery failed only because of too stout a resistance on the part of those in charge of the treasure."

persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distance and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise." In § 5—"In order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance, if necessary." So, in 1 Hawkins P. C., ch. 32, § 7 (7th ed.), being present in judgment of the law is equivalent to being actually present; for, says Hawkins, "the hope of their immediate assistance encourages and emboldens the murderer to commit the fact, which otherwise perhaps he would not have dared to do, and makes them guilty in the same degree [as principals] as if they had actually stood by, with their swords drawn, ready to second the villainy." These principles have been fully recognised by the very learned and distinguished chief justice of the Supreme Court of the United States, in 4 Cranch 492.

The person charged as a principal in the second degree must be present; and he must be aiding and abetting the murder. But if the abettor, at the time of the commission of the crime, were assenting to the murder, and in a situation where he might render some aid to the perpetrator, ready to give it if necessary, according to an appointment or agreement with him for that purpose, he would, in the judgment of the law, be present and aiding in the commission of the crime. It must therefore be proved that the abettor was in a situation in which he might render his assistance in some manner to the commission of the offence. It must be proved that he was in such a situation by agreement with the perpetrator of the crime, or with his previous knowledge, consenting to the crime, and for the purpose of rendering aid and encouragement in the commission of it. It must also be proved that he was actually aiding and abetting the perpetrator at the time of the murder. But if the abettor were consenting to the murder, and in a situation in which he might render any aid by arrangement with the perpetrator for the purpose of aiding and assisting him in the murder, then it would follow as a necessary legal inference that he

"If such was the character of the evidence against Laurie, we are satisfied that the instruction ought to have been refused. In the case supposed, Laurie would be not only an accessory before the fact (as having counseled, advised and encouraged the commission of the crime), but he would be a principal at least in the second degree."

was actually aiding and abetting at the commission of the crime. For the presence of the abettor under such circumstances must encourage and embolden the perpetrator to do the deed, by giving him hopes of immediate assistance; and this would in law be considered as actually aiding and abetting him, although no further assistance should be given. For it is clear that if a person is present, aiding and consenting to a murder or other felony, that alone is sufficient to charge him as a principal in the crime. And we have seen that the presence by construction or judgment of the law is in this respect equivalent to actual presence.

We do not, however, assent to the position which has been taken by the counsel for the government, that if it should be proved that the prisoner conspired with others to procure the murder to be committed, it follows, as a legal presumption, that the prisoner aided in the actual perpetration of the crime unless he can show the contrary to the jury. The fact of the conspiracy being proved against the prisoner is to be weighed as evidence in the case having a tendency to prove that the prisoner aided, but it is not in itself to be taken as a legal presumption of his having aided unless disproved by him. It is a question of evidence for the consideration of the jury.

If, however, the jury should be of opinion that the prisoner was one of the conspirators, and in a situation in which he might have given some aid to the perpetrator at the time of the murder, then it would follow, as a legal presumption, that he was there to carry into effect the concerted crime, and it would be for the prisoner to rebut that presumption by showing to the jury that he was there for another purpose unconnected with the conspiracy. We are all of opinion that these are the principles of the law applicable to the case upon trial.⁶

STATE v. BARRETT.

1889. SUPREME COURT OF MINNESOTA. 40 Minn. 77, 41 N. W. 463.

The defendant was indicted with his brother Timothy in the District Court of Hennepin County for the murder of Thomas Tollefson. Upon the trial before Lochren, J., and a jury, defendant was convicted of murder in the first degree, and sentenced to be hanged. He appeals from the judgment and from an order refusing a new trial.

⁶ There is no distinction between principals and accessories in treasons or misdemeanors, where all participating are principals; see 12 Cyc. 183, n. 36.

COLLINS, J.⁷—* * * From the testimony it appears that upon the night of the homicide the three brothers, Timothy, Peter, and Henry, left the house together, early in the evening, for the avowed purpose of visiting the business part of the city. Timothy and this defendant Peter carried revolvers. When returning home late at night, they resolved to rob a street-car driver, and in furtherance of the scheme placed planks across the track at one point. Later the three approached Tollefson as his car was on the turn-table at the end of the route, near a cemetery, and demanded his cash-box, Timothy and Peter presenting their weapons. Tollefson, the deceased, resisted, the accused fired his revolver, and, with the witness Henry, ran towards the cemetery. Almost immediately another shot was fired, and Timothy joined them, with the driver's cash-box under his arm, saying that he had "killed him; shot him through the head." The three then returned to their residence, the money found in the box was poured out upon a table, and the box buried in the cellar. Later it was dug up and cut in pieces by the accused and Timothy. The car tickets found therein were secreted under the house, and the pieces of the box thrown in a lake by the latter and Henry. It is manifest, as before stated, that the fatal shot was fired by Timothy, while that fired by this defendant passed through the thigh of deceased, causing a severe, but not necessarily fatal, wound. These circumstances are sufficient to make all principals, although the crime was actually perpetrated by only one of the number. The men had conspired and confederated to waylay and rob—to commit a felony. In the prosecution of this common object or purpose, murder resulted. The act of Timothy was in furtherance of the original unlawful design. It was a natural and probable consequence of it, for which all must be held accountable. In the eye of the law it was the act of each. 1 Russ. Crimes 56; 1 Archb. Crim. Pr. & Pl. [8th ed.] 56, Pom. note 1; Brennan v. People, 15 Ill. 511; Reg. v. Jackson, 7 Cox Crim. Cas. 357.

As we find no error in the case, the judgment and order denying a new trial are affirmed, and the case remanded for further proceedings.⁸

⁷ Part of the opinion is omitted.

⁸ Accord: Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Miller v. State, 25 Wis. 384; Ruloff v. People, 45 N. Y. 213, and People v. Giro, 197 N. Y. 152, 90 N. E. 432, in which Vann, J., says at pages 157 and 158: "The evidence warranted the jury in finding, and they are presumed to have found, that Giro and Schleiman were conspirators, engaged in the commission of a felony, when Mrs. Staber was killed. They armed themselves in advance, and in the dead of night took with them to the Staber house flashlights, ammonia bulbs and a jimmy, which are the peculiar, if not the exclusive, implements of burglars. Acting together they broke into the house for the purpose of robbing it, and were engaged one in robbing and the other in watching, when discovered. All that they

WHITE v. PEOPLE.

1891. SUPREME COURT OF ILLINOIS. 139 Ill. 143, 28 N. E. 1083,
32 Am. St. 196.

MR. CHIEF JUSTICE MAGRUDER delivered the opinion of the court⁹:

This is an indictment in the Circuit Court of Christian County against the plaintiff in error for assault with intent to commit murder upon the person of one W. A. Jordan by shooting him. He was found guilty by the jury and sentenced to three years in the penitentiary. * * *

The court told the jury in the seventh instruction given for the prosecution that, if they believed from the evidence in the case, beyond a reasonable doubt, that the defendant and one Robbins stole the property offered in evidence in this case from J. H. Southwick in Clay county, Ill., and carried the same to Assumption, Illinois, and were there trying to sell said property, and that the prosecuting witness, Jordan, was village marshal of Assumption at said time, and had reasonable ground to believe that said defendant and Robbins were in possession of stolen property, then it was his duty to apprehend and arrest them, "and if, while attempting to arrest them, one Robbins shot the said Jordan with intent to kill him, then this defendant, John White, would be guilty of said shooting, just the same as if he had fired the shot himself—provided you further believe from the evidence, beyond a reasonable doubt, that the defendant intended to resist the arrest by using extreme violence." We think that this instruction was erroneous for the reasons hereinafter stated.

If plaintiff in error and another had a common design to do an unlawful act, then in contemplation of law, whatever act such other person did in furtherance of the original design would be the act

did was in furtherance of their original design to rob the house, and what they did to save themselves and escape was as much a part thereof as breaking in with the jimmy or stealing the pocketbook. When they armed themselves to enter upon a felonious undertaking, shooting was the natural and probable result in order to get away if discovered, and if either fired the fatal shot both are responsible. From the beginning to the end they were engaged in a common crime, and the homicide was within the common purpose. Both were principals throughout, and what one did both did in the eye of the law. A shot fired by either under the circumstances disclosed by the evidence was the act of both, whether their minds met in the act of shooting or not, provided they met in the act of committing the burglary. That fundamental fact carried with it the heavy responsibility which the law places upon all who are acting together in the commission of a felony, when one of their number kills an outsider even by shooting to frighten and not to take life. If either defendant shot Mrs. Staber and caused her death both are equally guilty of murder in the first degree."

⁹ Arguments of counsel, and part of the opinion are omitted.

of both, and both would be equally guilty of whatever crime was committed. (*Hanna v. The People*, 86 Ill. 243.) The instruction does not proceed upon the assumption that the shooting was done by Robbins while he and plaintiff in error were engaged in the unlawful act of robbing Southwick's store, or while he and plaintiff in error were engaged in the unlawful act of concealing or disposing of the stolen property in their possession. The theft, and the possession of the stolen property, and the efforts to sell it, are simply referred to as showing the authority and duty of Jordan to make the arrest. If the instruction can be construed as asserting that the defendant and Robbins had a common design to do an unlawful act, the only unlawful act to which it so refers is resistance of arrest.

But the instruction does not submit to the jury the question whether or not the defendant and Robbins had combined, or formed a common design, or common intention to resist arrest by the officer. As defendant did not do the shooting himself, he could not be held responsible for the shooting done by Robbins unless he combined with Robbins to resist the arrest, or unless the shot was fired in the attempt to execute a purpose common to both Robbins and himself. The instruction, however, ignores the idea of a common design, or conspiracy, between the two men. The intent to kill is presented as the individual intent of Robbins, and the defendant is asserted to be equally guilty with Robbins, if he had the intention to resist arrest, even though he had formed such intention in his own mind without reference to Robbins, and independently of the question whether or not such intention was entertained in pursuance of a common design formed between himself and Robbins. * * *

It is true that the plaintiff in error would have been responsible if he had aided, or abetted, or advised, or encouraged Robbins in his unlawful conduct by signs or motions (*Brennan v. The People*, 15 Ill. 511), but, beyond the mere fact that the plaintiff in error turned around and put his hands in his coat pocket when Jordan stated that they must go to town with him, he made no sign or motion of any kind until he ran away. The turning around was not necessarily a threatening movement, but rather a natural one, in view of what Jordan said, and in view of the surprise at the discovery that the man who had been talking about hauling hay was an officer.

It is true that a revolver was found in the pocket of the coat after it was thrown away, but the possession of the revolver under the circumstances of this case did not necessarily indicate that it was intended to be used in resistance of arrest, as it was a part of the property that had been stolen, and which the possessors of it were trying to dispose of.

But even if the acts of the plaintiff in error in turning around and putting his hands in his pockets did indicate an intention on his part to resist arrest, there is no proof that Robbins saw either of these acts, or that they were intended as signs to Robbins that plaintiff in error would unite with him in an attempt to resist arrest. The mere presence of a party at an assault with intent to kill is not sufficient to constitute him a principal, unless there is something in his conduct showing a design to encourage, incite, or in some manner aid, or abet, or assist the assault. Aiding, abetting or assisting are affirmative in their character. It is not sufficient that there is a mere negative acquiescence, not in any way made known to the principal malefactor. (*White v. People*, 81 Ill. 333; *Lamb v. The People*, 96 Ill. 73; 9 Am. & Eng. Enc. of Law, pages 574, 575.) Here it appears, from the evidence of the prosecution, that the plaintiff in error stood outside of the track with a pistol in his possession until after Jordan had fired three shots at Robbins, and not only took no part in the assault, but made no "demonstrations" whatever, either of encouragement to Robbins, or of hostility towards Jordan.

After a careful examination of the evidence in this case in connection with the instructions, we are unable to say that it so far tends to sustain the verdict as to justify us in affirming the judgment.

The judgment of the circuit court is reversed, and the cause is remanded.

Judgment reversed.¹⁰

¹⁰ Accord: Holding that there must be a community of unlawful purpose when the criminal act is done, and the act must have been within the purpose, or a natural consequence thereof, to hold one not the perpetrator, as a principal; *State v. Maloy*, 44 Iowa 104; *Woolweaver v. State*, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. 667; *Mercersmith v. State*, 8 Tex. App. 211; *People v. Knapp*, 26 Mich. 112; *McLeroy v. State*, 120 Ala. 274, 25 So. 247; in which Haralson, J., says: "The well settled rule in reference to conspirators is that 'When two or more persons combine or conspire to do an unlawful act, or to commit a criminal offense, each is equally responsible for the act of the others in furtherance of the common purpose, if he is present at the time, aiding, encouraging, or ready to assist if necessary, and if the act done is within the scope of their common purpose, or is the natural and proximate consequence of the act intended; but they are not responsible for an act prompted by the individual malice of the perpetrator, and it is a question for the jury whether the act done was within the scope of the common purpose, or grew out of the individual malice of the perpetrator.' *Pierson v. The State*, 99 Ala. 148, 13 So. 550; *Williams v. The State*, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133"; *Evans v. The State*, 109 Ala. 11, 19 So. 535.

STATE v. ALLEN.

1879. SUPREME COURT OF ERRORS OF CONNECTICUT. 47 Conn. 121.

Indictment for murder in the Superior Court for Hartford County. The prisoner was indicted with Henry Hamlin and John H. Davis for the murder of Wells Shipman, a watchman at the state prison, the murder having been committed in an attempt of the defendant and Hamlin, who were convicts, to escape from the prison. The jury returned a verdict of murder in the first degree. The defendant moved for a new trial for error in the rulings and charge of the court.

BEARDSLEY, J.¹¹—* * * The court charged the jury as follows: "If the jury shall find that Hamlin and Allen, at some time previous to the homicide, made up their minds in concert to break the state prison and escape therefrom at all hazard, and knowing that the enterprise would be a dangerous one and expose them to be killed by the armed night watchman of the prison should they be discovered in making the attempt, wilfully, deliberately and pre-meditatedly determined to arm themselves with deadly weapons and kill whatever watchman should oppose them in their attempt; and if the jury should further find that in pursuance of such design they armed themselves with loaded revolvers to carry their original purpose into execution, and while engaged in efforts to escape from the prison were discovered by the watchman Shipman, the deceased, and in the scuffle which ensued he was wilfully killed by Hamlin or Allen while they were acting in concert and in pursuance of their original purpose so to do in just such an emergency as they now found themselves in, then Hamlin and Allen are both guilty of murder in the first degree. And, in the opinion of the court, Allen would be guilty of murder in the first degree, if, in the state of things just described, he in fact abandoned, just before the fatal shot was fired by Hamlin, all further attempt to escape from the prison, and the infliction of further violence upon the person of Shipman, without informing Hamlin by word or deed that he had so done, and Hamlin, ignorant of the fact, shortly after fired the fatal shot in pursuance of and in accordance with the purpose of the parties down to the time of the abandonment."

We do not think that the objection made by the defense to this part of the charge is well founded. Under such circumstances Allen's so-called abandonment would be but an operation of the mind—a secret change of purpose. Doing nothing by word or deed to inform his co-conspirator of such change of purpose, the reasonable inference would be that he did not intend to inform him of it,

¹¹ The statement of facts is condensed, and the arguments of counsel, and part of the opinion are omitted.

and thus he would be intentionally encouraging and stimulating him to the commission of the homicide by his supposed co-operation with him. Such intent not to inform Hamlin of his change of purpose would, under the circumstances, be decisive of his guilt.

But the charge proceeds: "In other words, if during the fatal encounter with deadly weapons, in the state of things just described, Allen suddenly abandoned Hamlin, abandoned the enterprise and went to his cell, without saying a word to Hamlin to the effect that he had abandoned the enterprise, and Hamlin, supposing that he was still acting with him and that he had gone to his cell for an instrument to carry on the encounter, fired the fatal shot, his abandonment under such circumstances would be of no importance. A man can not abandon another under such circumstances and escape the consequences of the aid he has rendered up to the time of the abandonment."

A majority of the court think that the jury may have been misled by this part of the charge, and that therefore, especially in view of the grave issues involved in the case, a new trial should be granted.

If Allen did in fact before the homicide withdraw from the conspiracy, abandon the attempt to escape, and with the knowledge of Hamlin leave and go to his cell, Hamlin's misconstruction of his purpose in leaving did not necessarily make his conduct of no importance.

Until the fatal shot there was the "*locus penitentiae*." To avail himself of it Allen must indeed have informed Hamlin of his change of purpose, but such information might be by words or acts; and if with the intention of notifying Hamlin of his withdrawal from the conspiracy he did acts which should have been effectual for that purpose, but which did not produce upon the mind of Hamlin the effect which he intended and which they naturally should have produced, such acts were proper for the jury to consider in determining the relation of Allen to the crime which was afterwards committed.

Allen's act of leaving and going to his cell, if he did so, had some significance in connection with the question of intention and notice, and was therefore proper for the consideration of the jury. How much weight was to be given to it would depend upon circumstances, such as the situation of the parties and the opportunity for verbal or other notice.

The same observations are perhaps applicable to the charge of the court in answer to the sixth request for instructions. While it is clear that the request as made should not have been complied with, the charge that was given may be open to the implication that some notice of Allen's abandonment of the conspiracy must have

been given by him to Hamlin beyond that afforded by his act of leaving.

The answers of the court to the other requests for instructions seem to us, in view of the claims of the counsel and the admitted facts in the case, to be correct and sufficiently explicit.

A new trial is advised.

In this opinion Granger, Sanford, and Hovey, Js., concurred. Loomis, J., dissented.¹²

Section 2.—Accessories Before and After the Fact.

"Accessories again are of two kinds, accessories before the fact committed, and accessories after. An accessory before is he, that being absent at the time of the felony committed doth yet procure, counsel, command, or abet another to commit a felony, and it is an offense greater than the accessory after. * * * If A hire B to mingle or lay poison for C, B doth it accordingly, and C is poisoned, B, though absent, is principal, A is accessory; but if A were present at the mingling or laying of the poison, they both were absent at the taking of it, yet both are principal, for they are both equally acting in the poisoning." 1 Hale P. C., ch. 55, §§ 615, 616.

"This kind of accessory after the fact is where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon. * * * If B commit a felony, and come to the house of A before he is arrested, and A suffer him to escape without arrest knowing him to have committed a felony, this doth not make A accessory, but if he take money of B to suffer him to escape, this makes him an accessory. 9 H. 4 l. And so it is if A shut the fore-door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape; this makes A accessory, for here is not a bare omission, but an act done by A to accommodate his escape. 8 E. 2 Coron. 427." 1 Hale P. C., ch. 56, §§ 618, 619.

REGINA v. RROWN.

1878. BRISTOL AUTUMN ASSIZES. 14 Cox Cr. C. 144.

Frederick Brown was indicted for murder, his wife being also indicted as an accessory before the fact. It was proved that the blow, which proved fatal, was struck within a few feet of where the wife was standing.

¹² On the question of abandonment of the common purpose see *Pinkard v. State*, 30 Ga. 757.

COLERIDGE, L., directed the acquittal of the female prisoner, pointing out that she should have been indicted as a principal, if anything. An accessory before the fact must be absent at the time when the crime is committed, and the act must be done in consequence of some counsel or procurement of his.¹³

ABLE v. COMMONWEALTH.

1869. COURT OF APPEALS OF KENTUCKY. 5 Bush (Ky.) 698.

CHIEF JUSTICE WILLIAMS delivered the opinion of the court.¹⁴

Appellant was indicted, tried and convicted in the Jefferson Circuit Court of stealing and carrying away two thousand six hundred dollars of gold coin, the property of James W. Gibson.

The evidence established that Able lived at Cairo, a small village in Henderson county, in this state, and that Gibson resided about two and a half miles from it, and had residing with him his grandson, about fifteen years of age; that Able approached the boy one day in Cairo and inquired whether his grandfather had not some gold. Being answered in the affirmative, he then inquired if he, the boy, could get this; and also being affirmatively answered, it was then agreed that the boy should get the gold and hide it at the stable, and that Able should come to the house at night and tap on the door, and the boy should run out and shoot at him, but over his head, for a blind. The grandfather was soon to be absent for some considerable time; and pursuant to said agreement, the accused did go to the house in the night, after the old man had left on his contemplated trip, and the boy shot twice over his head; but Abel could not find the money, consequently did not then get it. Several days thereafter, however, the boy took the money to Cairo and delivered it to him, when he took it to the town of Henderson, deposited it in a bank, where he permitted it to remain but a few days when he withdrew it and was found in possession of it all but about three hundred dollars, at Louisville. The only question on this appeal worthy of notice is, whether a conviction as a principal can be permitted to stand. * * *

Was Able a principal or an accessory before and after the fact?

In 4 Blackstone's Commentaries, 35, it is said, "an accessory is he who is not the chief actor in the offense, nor present at its performance, but is in some way concerned therein, either before or

¹³ Accord: *Williams v. State*, 47 Ind. 568; *Norton v. People*, 8 Cow. (N. Y.) 137; *Meister v. People*, 31 Mich. 99; *State v. Roberts*, 50 W. Va. 422, 40 S. E. 484.

¹⁴ Part of the opinion is omitted.

after the fact." And then defines an accessory before the fact to be one, "who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory." "An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon."

In 1 Wharton's American Criminal Law (§ 134) it is said, "an accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, or abet another to commit such felony. * * * To constitute a man accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, a principal." And such is the description of accessories before the fact given in § 42, 3 Greenleaf on Evidence. * * * To be a principal in either degree, there must be an actual or constructive presence at the commission of the offense. Advising its perpetration makes the advisor an accessory before the fact; receiving the stolen property, knowing it to be stolen, makes the receiver an accessory after the fact; but how can the advising its perpetration, and receiving the stolen property by the same party, when he was miles away at the perpetration of the offense, evidence either his actual or constructive presence at the time of the perpetration? It is agreed in all works on crimes, that the smallest asportation completes the crime of larceny; but, in the asportation of this money from the dwelling to the stable, or from the latter to the town of Cairo, Able was alike absent, both actually and constructively.

All the writers agree, that, by the common law, the punishment of principals in the first and second degree was the same, as well as accessories; but there were still important reasons why the party should be indicted for the actual offense perpetrated by him, to distinguish the nature and denomination of the crime, that the accused may know how to defend himself, and because, though indicted as accessory and acquitted, he may afterward be indicted as principal (4 Blk. 40). * * *

However ample the evidence may be, and however certain the guilt of the accused as an accessory before and after the fact, the evidence in this case does not show him guilty as a principal in either the first or second degree. * * *

Wharton, in section 114, says: "One indicted as principal can not be convicted on proof showing him to be only an accessory before the fact;" and we add, nor by proof that he afterwards received the stolen goods; for whether accessory before or after the fact or both combined, he is not a principal.

On the return of the cause, however, the court should proceed

to try the accused, on proper indictment, as an accessory, or remand him to the proper county for such proceedings.

Wherefore, the judgment is reversed, with directions to set aside the verdict and judgment, and for further proceedings consistent with this opinion.¹⁵ * * *

STATE v. LUCAS.

1880. SUPREME COURT OF IOWA. 55 Iowa 321, 7 N. W. 583.

The defendant, Frank Lucas, was indicted jointly with Charles Wood and James White, for a robbery from the person of R. G. Edwards, perpetrated by assaulting and wounding him with deadly weapons. The defendant was tried, convicted, sentenced and committed to the penitentiary for twelve years. He appeals.

DAY, J.—R. G. Edwards, on behalf of the state, testified in substance that he was night watchman for Hemmingway & Barclay's mill, at Lansing; that on the night of August 24, 1879, the defendant and Wood assaulted and knocked him down, tied his hands and feet and carried him into the mill, and that while the defendant went after a sledge to open the safe in the mill, Wood took three dollars in silver from his pocket. The evidence shows that the safe was blown open on the same night. The defendant, on his own behalf, testified that he had nothing to do with robbing Edwards, and was not at the mill at all; that he rowed Wood and Harris in a skiff, from LaCrosse to Lansing, and landed near the mill about nine o'clock on the night of the robbery; that Wood and Harris went up town and left him to watch the boat; that afterward they came down to the boat in a hurry and directed him to row over to Wisconsin; that on the way he saw them dividing some silver money; that when they reached the Wisconsin shore they sunk the boat; that on the way to LaCrosse, Wood told him all that happened, and gave him two revolvers to carry.

The court instructed the jury as follows: "If you believe from all the evidence that the defendant did not leave the boat after the arrival at Lansing; yet if you also believe that he had knowledge of the intent of his associates to commit crime, either of robbery of the man Edwards, or of robbing the safe in Barclay & Hemmingway's mill, or any other crime, and rowed them ashore for such purpose, and waited in the boat for them during their absence in committing the crime, then you will find the defendant guilty."

¹⁵ At common law an accessory could not be tried, without his consent, before the conviction of his principal, unless they were tried together (see 12 Cyc. 194, note 2), and acquittal of the principal freed the accessory (See 12 Cyc. 195, note 12.)

The doctrine of this instruction is that if the defendant knew of the intent of his associates to rob the safe in Barclay & Hemmingway's mill, and rowed them ashore for that purpose and awaited their return, he is guilty of the robbery of Edwards. This doctrine is not correct. It is true the accessory is liable for all that ensues upon the execution of the unlawful act contemplated; as, if A commanded B to beat C, and he beats him so that he dies, A is accessory to the murder. So if A commanded B to burn the house of C, and in doing so the house of D is also burned, A is accessory to the burning of D's house. So, in this case, if Lucas had knowledge of the intention to rob the safe, and aided and abetted his associates in the commission of that offense, and if, in furthering that purpose, a fatal assault had been made upon Edwards, the defendant would have been accessory to the murder.

But, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A, and instead of so doing he intentionally commit the same crime against B, the accessory will not be answerable. See 1 Wharton's Criminal Law, § 134, and authorities cited. It follows that the defendant can not be convicted of a robbery of Edwards, from the mere fact that he abetted his associates in the robbery of Barclay & Hemmingway's safe. If the intention of Lucas was to abet, and share in the proceeds of, any robbery that his associates might commit, a different rule would apply. But this is not the thought of the instruction under consideration. Our view of the law governing this case is sufficiently indicated by the foregoing, without noticing consecutively the other errors assigned and argued.

Reversed.

WREN v. COMMONWEALTH.

1875. SUPREME COURT OF APPEALS OF VIRGINIA. 26 Gratt. 952.

CHRISTIAN, J., delivered the opinion of the court.¹⁶

* * * The accused is charged with accessorial guilt. He is charged in the indictment with unlawfully receiving, harboring and maintaining John Dull, knowing him to have committed a felony. This charge constitutes what the law denominates "an accessory after the fact." The common law definitely and distinctly defines who is such an offender. He is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. 1 Hale P. C. 618; 1 Arch. Crim. Prac. 78, and cases there cited.

¹⁶ Statement of facts, and part of the opinion are omitted.

The reason on which the common law makes a party in such a case criminal, is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon.

To constitute one an accessory after the fact, three things are requisite: 1. The felony must be completed.¹⁷ 2. He must know that the felon is guilty.¹⁸ 3. He must receive, relieve, comfort or assist him. It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony. 2 Hawk., ch. 29, § 32. And although it seemed at one time to be doubted whether an implied notice of the felony will not in some cases suffice, as where a man receive a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge. 1 Hale 323, 622; 3 P. Wms. R. 496; 4 Black. Com. 37.

But knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury.

As to the receiving, relieving and assisting, one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon, would constitute a man accessory after the fact. 1 Hale 619, 621; 2 Hawk., ch. 29, § 26. But merely suffering the principal to escape, will not make the party accessory after the fact; for it amounts at most but to a mere omission. 1 Hale 619; 1 Hale 4, 1. Or if he agree for money not to prosecute the felon; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprision of it, the doer will not be an accessory. 1 Bishop, § 633; 1 Hale 371, 618. "The true test (says Bishop, § 634) whether one is accessory after the fact, is to consider whether what he did was done by way of per-

¹⁷ Accord: *Harrel v. State*, 39 Miss. 702, 80 Am. Dec. 95.

¹⁸ See *Commonwealth v. Filburn*, 119 Mass. 297; *State v. Empey*, 79 Iowa 460, 44 N. W. 707; but see *Tully v. Commonwealth*, 13 Bush (Ky) 142, holding a reasonable belief sufficient.

sonal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant."

In *Regina v. Chapple et al.*, 9 Car. & Payne R. 355, it was held that "to substantiate the charge of harboring a felon, it must be shown that the party charged did some act to assist the felon personally." This decision is in strict accordance with the established principles of the common law. See Arch. Crim. Plead. and Prac. 78-9, note.

Now applying these well recognized principles to the case before us, we are of opinion that the Commonwealth has failed to show that the plaintiff in error is an accessory after the fact to the felony committed by John Dull. Upon the Commonwealth's evidence, giving it full force and effect, with all the fair and legal inferences to be drawn from it, and discarding the evidence offered by the accused, the case made out does not contain the constituent elements required to make the accused an accessory after the fact. * * *

If, knowing that a felony had been committed, he concealed it, then he is guilty of misprision of felony. If, knowing a felony to be committed he concealed it, or forbore to arrest and prosecute the felon, for a fee or reward, then he is guilty of compounding a felony. Both of these are grave offences; but they do not (if proved) constitute a party an accessory after the fact. This view of the case makes it unnecessary to pass upon the first assignment of error.

The court is therefore of opinion, that the Hustings court erred in not setting aside the verdict of the jury as contrary to the law and the evidence. The judgment must therefore be reversed, and the case be remanded to the said Hustings court for a new trial to be had therein in conformity with the foregoing opinion.

Judgment reversed.

Section 3.—Principal and Agent.

COMMONWEALTH v. WACHENDORF.

1886. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
141 Mass. 270, 4 N. E. 817.

MORTON, C. J.—This complaint charges that the defendant, on October 3, 1885, unlawfully sold intoxicating liquor between the hours of eleven at night and six in the morning. Stat. 1885, ch. 90, § 1. At the trial, it appeared that the defendant kept a restaurant and saloon; and that he had a license, one of the conditions of

which was that no sale of spirituous or intoxicating liquor should be made therein between the hours of eleven at night and six in the morning. There was evidence tending to show a sale by one of the defendant's waiters of a bottle of Bass's after eleven o'clock at night on the day named in the complaint. The defendant introduced evidence to show that he had given strict orders to close the sale of intoxicating liquors at eleven o'clock at night, and asked the court to rule that, "if one of his employes willfully, or in violation of his instruction, had sold a bottle of ale on that night, after eleven o'clock, such a sale would not make him liable under this law." The court refused this instruction, and instructed the jury that the license was violated if any sale was made after eleven o'clock, though by a servant in violation of the instructions of the defendant; and that, if the sale proved in this case was made by a servant of the defendant, in the course of business which he was doing for the defendant, he was liable, although he had given directions to his servant not to sell after eleven o'clock.

It may be that a license is forfeited by the unauthorized act of another person, done without the knowledge and against the express directions of the licensee. The legislature has judged it wise, in view of the many devices resorted to in order to evade the law, to make the conditions of licenses very stringent. It has been held in several cases that a licensee takes his license subject to the conditions, whatever they may be, and is bound at his peril to see that these conditions are complied with, or to lose the protection of his license. *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Barnes*, 138 Mass. 511, and cases cited. But the question in this case is not whether the defendant's license is forfeited.

The complaint is not brought under the Pub. Stat., ch. 100, § 18, alleging that he has violated the provisions of his license. It is brought under the first section, which provides that "no person shall sell, or expose, or keep for sale, spirituous intoxicating liquor, except as authorized in this chapter." It was held in *Commonwealth v. Nichols*, 10 Metc. 259, decided under a law similar in its terms, that the defendant was not liable criminally as a seller, when the sale proved was made by a servant without his knowledge, in opposition to his will, and which was in no way participated in, approved, or countenanced by him. This decision is conclusive of the case before us. It would require a clear expression of the will of the legislature to justify a construction of a penal statute which would expose an innocent man to a disgraceful punishment for an act of which he had no knowledge, which he did not in any way take part in or authorize, but which he had forbidden. In other parts of the statute, where the legislature intend to impose a more stringent liability, different language is used. Thus, broader

language is used in the condition of the license, such as "that no sale of spirituous or intoxicating liquor shall be made" between eleven and six o'clock; "that no liquor except such as is of good standard quality and free from adulteration shall be kept or sold;" that there shall be no disorder, indecency, etc., on the premises. It may be that the fair inference is that the legislature intended, by the use of this language, to hold the licensee responsible for the unauthorized acts of others, and to require that he should see, at his peril, that the conditions were complied with. Such a construction has been given to § 12, which provides that no licensee shall place or maintain, or permit to be placed or maintained, on the premises, any screen, curtain, or other obstruction. It has been held that a licensee is liable for a screen or curtain which a servant maintained, in the absence of the licensee and against his orders, upon the ground that, in view of the language used and the nature of the prohibited act, the inference is that the legislature intended to hold the licensee responsible for the condition of his premises, and liable, whether the prohibited act was done by him personally, or by his agent left by him in charge of his business. *Commonwealth v. Kelley*, 140 Mass. 441.

Section 1, upon which the complaint in the case at bar is based, subjects to punishment any person who sells liquor unlawfully. It is to be presumed that the legislature intended to use the language in its natural sense, and with the meaning given to equivalent language by the court in *Commonwealth v. Nichols*. It is not a necessary or reasonable construction to hold that it subjects a person who does not sell, because a servant in his employment, in opposition to his will and against his orders, makes an unlawful sale. We are therefore of opinion that the instruction requested by the defendant should have been given. Of course, it would be for the jury, under the instruction, to determine whether the defendant did, in good faith, give instructions, intended to be obeyed and enforced, that no sale should be made after eleven o'clock. If he did, and a sale was made in violation of them, without his knowledge, he can not be held guilty of the offense charged in the complaint.

Exceptions sustained.¹⁹

¹⁹ Accord: Holding that a principal is not liable criminally for the acts of an agent done without his authority, knowledge, or consent. *Commonwealth v. Briant*, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; *State v. Mahoney*, 23 Minn. 181; *State v. Burke*, 15 R. I. 324, 4 Atl. 761; *Rosenbaum v. State*, 24 Ind. App. 510, 57 N. E. 156; *Chisholm v. Doulton*, 22 Q. B. D. 736. It is not a defense to a criminal charge that one acted as the agent or employe of another. *State v. Chauvin*, 231 Mo. 31, 132 S. W. 243; *Alt v. State*, 88 Nebr. 259, 129 N. W. 432; *Commonwealth v. Bottom*, 140 Ky. 212, 130 S. W. 1091; *State v. Bugbee*, 22 Vt. 32.

CHAPTER XI.

CRIMES AGAINST THE PERSON.

Section 1.—Assault.

"An assault is an attempt or offer, with force and violence, to do a corporeal hurt to another; as by striking another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability of using actual violence against the person of another, will amount to an assault.

"But it appears to be now quite settled, though many ancient opinions were to the contrary, that no words whatsoever, be they ever so provoking, can amount to an assault." 3 Russell on Crimes (6th ed.) 304.

COMMONWEALTH v. STRATTON.

1873. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
114 Mass. 303, 19 Am. Rep. 350.

Indictments, each charging that the defendant, upon a certain young woman, in the indictment named, made an assault and administered to her a large quantity of cantharides, the same being "a deleterious and destructive drug," with intent to injure her health, whereby she became sick and her life was despaired of. Both cases were tried together.

It appeared at the trial in the Superior Court before Devens, J., that the defendant, in company with another young man, called upon the young woman in the indictment named, and during the call offered them some figs, which they ate, they having no reason to suppose that the figs contained any foreign substance; that a few hours after, both young women were taken sick and suffered

pain for some hours; that the defendant and his companion had put into the figs something they had procured by the name of "love powders," which was represented by the person of whom they got it to be perfectly harmless.

There was evidence that one of the ingredients of these powders was cantharides, and that this would tend to produce sickness like that which the young women suffered.

The court instructed the jury that if it was shown beyond a reasonable doubt "that the defendant delivered to the woman a harmless article of food, as figs, to be eaten by them, he well knowing that a foreign substance or drug was contained therein, and concealing the fact, of which he knew the women to be ignorant, that such foreign substance or drug was contained therein, and the women eating thereof, by the invitation of the defendant, were injured in health by the deleterious character of the foreign substance or drug therein contained, the defendant should be found guilty of an assault upon them, and this, although he did not know the foreign substance or drug was deleterious to health, had been assured that it was not, and intended only to try its effect upon them, it having been procured by him under the name of a 'love powder,' and he being ignorant of its qualities or of the effects to be expected from it."

The jury found the defendant guilty of a simple assault in each case, and he alleged exceptions.

WELLS, J.—All the judges concur that the evidence introduced at the trial would warrant a conviction of assault and battery, or for a simple assault, which it includes. And in the opinion of a majority of the court, the instructions given required the jury to find all that was essential to constitute the offence of assault and battery.

The jury must have found a physical injury inflicted upon another person by a voluntary act of the defendant, directed towards her, which was without justification and unlawful. Although the defendant was ignorant of the qualities of the drug he administered, and of the effects to be expected from it, and had been assured and believed that it was not deleterious to health, yet he knew it was not ordinary food, that the girl was deceived into taking it, and he intended that she should be induced to take it without her conscious consent, by the deceit which he practiced upon her. It is to be inferred from the statement of the case that he expected it would produce some effect. In the most favorable aspect of the facts for the defendant, he administered to the girl, without her consent and by deceit, a drug or "foreign substance," of the probable effect of which he was ignorant, with the express intent and purpose "to try the effect upon" her. This, in itself, was unlawful, and he must be held responsible for whatever effect it produced. Being an unlawful interference with the personal rights of another calculated to result and in fact resulting, in physical injury, the criminal intent is to be inferred from the nature of the act and its actual

results. 3 Bl. Com. 120; *Rex v. Long*, 4 C. & P. 398, 407, note. The deceit, by means of which the girl was induced to take the drug, was a fraud upon her will, equivalent to force in overpowering it. *Commonwealth v. Burke*, 105 Mass. 376, 7 Am. Rep. 531; *Regina v. Lock*, 12 Cox C. C. 244; *Regina v. Sinclair*, 13 Cox C. C. 28.

Although force and violence are included in all definitions of assault, or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. In 3 Chit. Crim. Law 799 is a count at common law for an assault with drugs. For other instances of assault and battery without actual violence directed against the person assaulted, see 1 Gabbett's Crim. Law 82; *Rosc. Crim. Ev.* (8th ed.) 296; 3 Bl. Com. 120, and notes; 2 Greenl. Ev., § 84.

If one should hand an explosive substance to another, and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault, if the substance failed to explode or failed to cause any injury. It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it can not be material whether it acts upon the person injured externally or internally, by mechanical or chemical force.

In *Regina v. Button*, 8 C. & P. 660, one who put Spanish flies into coffee to be drank by another, was convicted of an assault upon the person who took it, although it was done "only for a lark." This decision is said to have been overruled in England. *Regina v. Dilworth*, 2 Mood. & Rob. 531; *The Queen v. Walkden*, 1 Cox C. C. 282; *Regina v. Hanson*, 2 C. & K. 912. In the view of the majority of the court, the last only of these three cases was a direct adjudication, and that entirely upon the authority of mere dicta in the other two, and without any satisfactory reasoning or statement of grounds; and the earlier decision in *Regina v. Button* is more consistent with general principles, and the better law.

Exceptions overruled.¹

¹ Accord: *Johnson v. State*, 92 Ga. 36, 17 S. E. 974; *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. 408, but see *Reg. v. Hanson*, 4 Cox Cr. C. 138, and *Reg. v. Walkden*, 1 Cox Cr. C. 282. In *Reg. v. Clarence*, 22 Q. B. D. 23, supra, a husband was held to be not guilty of an assault where, knowing that he had a venereal disease, and while his wife was ignorant of the fact, he had intercourse with her and infected her.

PRICE v. UNITED STATES.

1907. CIRCUIT COURT OF APPEALS OF THE UNITED STATES.
156 Fed. 950.

Appeal from United States court for China, and upon return to mandate of United States Circuit Court of Appeals.

Before Gilbert, Circuit Judge, and De Haven and Hunt, District Judges.

DE HAVEN, District Judge.²—The defendant was charged, by information filed in the United States court for China, with the crime of assault with a dangerous weapon, was tried, convicted, and sentenced to imprisonment for the term of six months in the jail of the American consul at Shanghai. The case is before us on an appeal by the defendant from this judgment. * * *

The court found, and there is evidence to justify the finding, that the defendant at the time and place stated in the information, while engaged in an angry altercation with the complaining witness, without justification, and within shooting distance, drew a revolver and pointed it toward the witness in a threatening manner, putting him in such fear that he got under a table for safety. The court also found, and, indeed, the fact is undisputed, that the pistol was unloaded, but this was not known to the complaining witness. We think, upon the facts stated, the judgment of the court, convicting the defendant of the offense of an assault with a dangerous weapon, can not be sustained. In order to constitute that offense, a dangerous weapon must be used in making the assault. The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon from a simple assault. A dangerous weapon "is one likely to produce death or great bodily injury." *U. S. v. Williams* (C. C.), 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm. And it is perfectly clear that an unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon. If the defendant had struck or attempted to strike with it, the question whether it was or was not a dangerous weapon in the manner used, or attempted to be used, would be one of fact; but the courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon.

But, while the evidence does not show that the defendant com-

² Part of the opinion is omitted.

mitted the crime of an assault with a dangerous weapon, it is yet sufficient to prove him guilty of the minor offense of assault. It is true, as contended by counsel for appellant, that it has been adjudged in many cases that pointing an unloaded pistol at another accompanied by a threat to shoot, does not constitute an assault. This was so held in *Klein v. State*, 9 Ind. App. 161, 36 N. E. 763, 53 Am. St. 354; *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42, and *People v. Sylva*, 143 Cal. 62, 76 Pac. 814, relied upon by defendant, and other cases may be cited to the same effect. The cases from Indiana and California are based upon a statute in force in each of these states, defining an assault as "an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another." *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42, does not rest upon any statute, but lays down the broad rule "that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another." We do not concur in this statement of the law, and in our opinion the true rule is stated by Mr. Bishop in his work on Criminal Law (volume 2 [3d ed.] § 53), in the following language:

"There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created; for his suffering is the same in the one case as in the other, and the breach of the public peace is the same. Therefore, if within shooting distance one menacingly points at another with a gun, apparently loaded, not loaded in fact, he commits an assault the same as if it were loaded. There must in such case be some power, actual or apparent, of doing bodily harm; but apparent power is sufficient."

This view is sustained by many cases, only two of which will be cited: *Commonwealth v. White*, 110 Mass. 407; *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373. In *Commonwealth v. White*, the defendant had been convicted of an assault. The trial court instructed the jury:

"That if the defendant, within shooting distance, menacingly pointed at Harrington a gun, which Harrington had reasonable cause to believe was loaded, and Harrington was actually put in fear of immediate bodily injury therefrom, and the circumstances of the case were such as ordinarily to induce such fear in the mind of a reasonable man, that then an assault was committed, whether the gun was in fact loaded or not."

In sustaining this instruction the Supreme Court of Massachusetts said:

"It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate

an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

In *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373, the action was trespass for an assault. It appears from the statement of facts that:

"The evidence tended to show that the defendant snapped the gun twice at the plaintiff and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded."

The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded. In upholding this instruction the Supreme Court of New Hampshire thus forcibly states the rule which justified it:

"We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity."

Our conclusion is that when the court gave credit to the testimony of the witnesses for the prosecution, as it did, and also found from the evidence offered by defendant that the pistol was unloaded, it should have found the defendant guilty of a simple assault.

The judgment is reversed, and the case remanded for a new trial.³

³ Accord: *State v. Atkinson*, 141 N. Car. 734, 53 S. E. 228; *State v. Barry*, 45 Mont. 598, 124 Pac. 775; *State v. Archer*, 8 Kans. App. 737, 54 Pac. 927; *State v. Shephard*, 10 Iowa 126; *People v. Morehouse*, 53 Hun (N. Y.) 638, 6 N. Y. S. 763, 25 N. Y. St. 294; contra, *State v. Godfrey*, 17 Ore. 300, 20 Pac. 625, 11 Am. St. 830; *McKay v. State*, 44 Texas 43; *State v. Sears*, 86 Mo. 169; see also, 15 L. R. A. (N. S.) 1272, note, discussing this question with a review of the authorities. Indecent liberties taken with a female against her will constitute an assault. *Slawson v. State*, 39 Texas Cr. 176, 45 S. W. 575, 73 Am. St. 914; or with a female too young to legally consent. *Oliver v. State*, 45 N. J. L. 46. Assaults in most jurisdictions are punished more severely if committed with a dangerous weapon or with intent to kill, rape, rob, or to commit some other felony.

Section 2.—Mayhem.

"A maim at common law is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporeal abilities, it does not fall within the crime of mayhem. Upon this distinction the cutting off, disabling, or weakening a man's hand or finger, striking out an eye or foretooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law. But in order to found an indictment or appeal of mayhem the act must be done maliciously; though it matters not how sudden the occasion." * * *

The principal and most severe statute upon this subject is that of the 22 and 23 Car. 2, ch. 1, commonly called the Coventry Act, from the circumstance of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in Parliament. It enacts "that if any person or persons shall, on purpose and of malice aforethought, by laying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject; with intention in so doing to maim or disfigure him in any of the manners before mentioned; that then the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offense as aforesaid, shall be declared to be felons, and suffer death as in cases of felony without benefit of clergy. But not to work corruption of blood, forfeiture of dower, or of the lands or goods of the offender." 1 East P. C., ch. 7, §§ 1 and 2.

FOSTER v. PEOPLE.

1872. COURT OF APPEALS OF NEW YORK. 50 N. Y. 598.

ANDREWS, J.⁴—Upon the conclusion of the testimony, the prisoner's counsel requested the court to charge the jury that upon the indictment and evidence the jury could convict the prisoner of murder in the second degree, and further, that if the prisoner killed the deceased by an assault upon him with a dangerous weapon with intent to maim him, but without any intent to effect death, such killing was murder in the second degree.

⁴ Statement of facts, arguments of counsel, and part of the opinion are omitted.

The court refused to charge either of these propositions, and to this refusal the prisoner's counsel excepted. * * *

The prisoner intentionally aimed a blow at the head of the deceased with a dangerous weapon, and with a force likely to fracture the skull, and which in fact did crush it, and it is insisted that upon this evidence, and in the absence of any proof of antecedent or subsequent facts tending to establish it, the jury might have found that the prisoner's intent was to fracture the skull or injure the head, and not to kill, and if such intent had been found, there was an assault with an attempt to maim, within the statute. Mayhem at common law is defined by Blackstone as the violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary. (4 Black. 204.)

It was recognized as a felony at a very early period of the common law, and the offender was punished by the loss of the same member of which he had deprived the party maimed: *membrum pro membro*.

It was treated as an offense against the state, for the reason assigned by Lord Coke (1 Inst. 127): "For the members of every subject are under the safeguard and protection of the law, to the end that a man may serve his king and country when occasion shall be offered."

The special injuries which constitute mayhem are stated, by Hawkins, as follows:

"And therefore the cutting off or disabling or weakening a man's hand or finger, a striking out his eye or foretooth, or castrating him, are said to be maims; but the cutting off his ear or nose are not esteemed maims, because they do not weaken, but only disfigure him." (1 Hawkins Pleas of the Crown 107.)

And Blackstone treats it as an injury resulting in a permanent disability, and says it is attended with this aggravating circumstance, that thereby the party injured "is forever disabled from making so good a defense against future external injuries as he otherwise might have done." (3 Bl. 131.)

An injury to the head or skull is not specified by Hawkins or Blackstone as mayhem; and as the usual consequence of such an injury is either death or temporary disability, it does not seem to be embraced within the definition of that crime as given by these commentators.

In the definition of mayhem by Lord Coke, the breaking of the skull is included.

"Mayhem," he says, "signifieth a corporeal hurt, whereby a man looseth a member by reason whereof he is less able to fight, as by putting out his foretooth, breaking his skull, striking off his arm,

hand or finger, cutting off his leg or foot, or whereby he looseth the use of any of his said members." (Coke Litt. 288a.)

And Lord Coke refers to the authority of Glanville and Britton in support of this definition:

"Mayhem," says Glanville, "signifies the breaking of any bone or injuring the head by wounding or abrasion. In such case the accused is obliged to purge himself by the ordeal, that is, by the hot iron, if he be a freeman; by water, if he be a rustic." (Glanville, Blain's translation, book 14, ch. 1, 350; see, also, Britton, Nichols' translation, liv. 1, ch. 26, fol. 48b, 49a, 123.)

Some recognized instances of mayhem are omitted in Glanville's definition, and it would seem to include any injury to the head, however trivial. But no authority has been cited, subsequent to the time of Lord Coke, nor has any come to our notice, for the proposition that a fracture of the skull is mayhem, except that Mr. East, in his *Pleas of the Crown* (p. 393), after giving the general definition of mayhem at common law, and instances in illustration of it, concludes, "or, as Lord Coke adds, breaking the skull."

But whatever acts may have been recognized as mayhems, at a remote period of the common law, the crime and the punishment became the subject of statute definition and regulation. Some statutes had been passed upon the subject prior to the reign of Car. II, but the first general and comprehensive one was the statute 22 and 23 Car. II, ch. 1, entitled "An act to prevent malicious maiming and wounding."

Chitty speaks of it as the most important and extensive ancient statute upon this subject. (*Criminal Law*, vol. 3, 785.) And Blackstone says that this and the prior statutes "put the crime and punishment of mayhem more out of doubt." (4 Bl. 206.)

By this statute it is enacted that any person who "shall on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out the eye, slit the nose or lip, or cut off or disable any limb or member of any subject, with intention in so doing to maim or disfigure him in any of the manners aforesaid," shall be guilty of a felony without benefit of clergy.

Whatever may have been the law of mayhem in England antecedent to this statute, no case can be found, we think, arising since its enactment, in which an injury to the head, or any act or injury, has been regarded as mayhem, other than the acts and injuries enumerated in this statute.

It has been regarded as defining what before may have been uncertain. And it was held in *Rex v. Lea* (1 Leach 51), where a husband had cut the throat of his wife quite across, that it was not maiming within this statute.

The act of Car. II has been the basis of the legislation of this state on the subject of maiming. * * *

The Revised Statutes (2 R. S., §§ 36, 665) declare: "that every person who, from a premeditated design, etc., shall, first, cut out or disable the tongue; or, second, put out an eye; or, third, slit the lip or destroy the nose; or, fourth, cut off or disable any limb or member of another on purpose, upon conviction thereof, shall be imprisoned in a state prison," etc.; following the enumeration in the previous statutes.

The statute of Car. II has been followed; also, in the legislation by congress and of many of the states of the union. (See collection of statutes in Wharton's Criminal Law, title "Mayhem.")

We are of opinion that since that statute the crime of mayhem includes those injuries only which are therein enumerated, and that the section of the Revised Statutes above cited was intended as a statute definition of that crime. * * *

If the prisoner acted from premeditation he may have intended to kill the deceased or simply to do him a bodily injury; but that he intended the particular injury of breaking the skull only can not be inferred.

If a blow aimed at an arm is by accident deflected from its course and inflicts a mortal wound, in such or similar cases, an intent to maim only might be found by the jury; and if, in this case, death had not resulted the prisoner might, perhaps (assuming that the fracture of the head was a maiming), have been convicted of an intent to maim. (East's Pleas of the Crown, title "Mayhem," Vict. I, 400; *Rex v. Cooke*, 1 St. Tr. 54.)

But the request to charge was irrelevant and inapplicable to the facts, and the court was justified in refusing to grant it.

The jury have by their verdict found that the prisoner, when he struck the blow, intended to kill the deceased.

By necessary inference the jury must have found that the prisoner was not, at the time of the act, engaged in the commission of any felony other than the homicide of which he was convicted. * * *

The judgment is affirmed.

All concur.

Judgment affirmed.⁵

Section 3.—Robbery.

"Open and violent larceny from the person, or robbery, the rapina of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. 1. There must be a taking, otherwise it is no robbery. * * * If the thief having once taken a purse, re-

⁵ The crime of mayhem is now almost universally defined by statutes.

turns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. But if the taking be not either directly from his person or in his presence, it is no robbery. 2. It is immaterial of what value the thing taken is: a penny as well as a pound thus forcibly extorted makes a robbery. 3. Lastly, the taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. * * * And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent." 4 Back Com. 241, 242.

CLARY v. STATE.

1878. SUPREME COURT OF ARKANSAS. 33 Ark. 561.

ENGLISH, C. J.⁶—James Clary, George Hall and Charles Hall were indicted in the Circuit Court of Pulaski County for burglary and robbery. On the first count, which charged them with breaking and entering a railroad car in the night time with intent to commit a felony, they were acquitted. They were found guilty on the second count, and the jury fixed their punishment severally at imprisonment in the penitentiary for seven years and six months. They filed a motion in arrest of judgment, which the court overruled. * * *

The second count of the indictment upon which appellants were convicted is literally as follows:

"The grand jury aforesaid, in the name and by the authority of the State of Arkansas, accuse said James Clary, Charles Hall and George Hall of the further crime of robbery committed as follows: The said James Clary, Charles Hall and George Hall, on the 4th day of November, 1878, in the county of Pulaski, and state aforesaid, feloniously and wilfully did make an assault upon one James Fisher, in bodily fear and danger of his life, then and there feloniously and wilfully one pair of boots worth six dollars, and one pair of shoes worth four dollars, a lot of painting tools, to-wit: ten worth three dollars each, one valise worth six dollars, one hat worth four dollars, one pistol worth ten dollars, all the property of said

⁶ Part of the opinion is omitted.

James Fisher, then and there feloniously, wilfully and violently did seize, take and carry away with intent from the person of the said James Fisher, the said property from the said James Fisher to rob and steal, against the peace and dignity of the state of Arkansas."

The grounds of the motion in arrest were that the facts alleged in this count did not constitute a public offense, etc., and that the allegations in the count did not constitute the offense attempted to be charged.

It is submitted by the Attorney-General that though the count may not be good under the common-law definition of robbery, it charges every material fact necessary to constitute robbery under our statute. * * *

Robbery, says Mr. Archbold, is defined to be a felonious taking of money or goods from the person of another, or in his presence, against his will, by violence or putting him in fear. And this violence or putting him in fear must precede or accompany the stealing. (In note.) The words of the definition of robbery are in the alternative, "violence or putting in fear," and it appears that if the property be taken by either of these means, and against the will of the party, such taking will be sufficient to constitute robbery. The principle, indeed, of robbery is violence, but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence. 3 Arch. Cr. Prac. and Plead. 417, 418, 6th ed.

By statute.—"Robbery is the felonious and violent taking of any goods, money, or other valuable thing from the person of another by force or intimidation; the manner of the force, or the mode of intimidation, is not material, further than it may show the intent of the offender." Gantt's Digest, § 1322.

The statute substitutes the word "intimidation" for the words "putting in fear" used in the common-law definition of robbery, but the definitions are substantially the same, the statute making no material change. * * *

Doubtless the count in question was drafted hastily and in the press of court business. Its allegations as to the offense charged are confused and uncertain, and it falls below the standard of good common-law or code pleading. * * *

The judgment must be reversed, and the cause remanded, with instructions to the court below to hold appellants to answer a new indictment, but not for the burglary of which they were acquitted in this case.

STOCKTON v. COMMONWEALTH.

1907. COURT OF APPEALS OF KENTUCKY. 125 Ky. 268,
101 S. W. 298.

Opinion of the court by JUDGE NUNN—Affirming.⁷

The appellants were indicted, tried, and convicted of the crime of robbery; each receiving a sentence of five years in the penitentiary. Appellants' counsel contends that the testimony did not show that the appellants had committed the crime of robbery, and that the court should have given a peremptory instruction to the jury to find for the appellants.

The testimony of Thomas Warner, the prosecuting witness, was to the effect that he lived in the county of Mason, and went to the town of Maysville, Saturday afternoon, March 10, 1906; that he went to the bank and had two checks cashed, one for \$8 and the other for \$14. After leaving the bank he met appellant Stockton, who asked him if he desired to trade a watch for a pistol. He informed him that he did not, and then was asked by Stockton if he played cards or shot dice, and he informed him that he did not. Witness then went to Front street. Witness further stated: "When Stockton and I got to the alley on Front street, Tillman came down the alley to us. Stockton asked me if I could change a \$10 bill. Tillman was standing to my right and Stockton in front of me. I first reached out my hand towards Stockton with the \$10 bill in it; but, when I saw that Stockton had not the money in his hand to exchange for it, I withdrew my hand. Then Stockton says—after taking some silver money out of his pocket and kinder holding out his hand, said, 'Now let me have the bill.' I stretched out my hand with the \$10 bill, holding the bill in my hand. Whereupon Bob Tillman, who was standing at my right, snatched the bill from me, and they both ran." * * *

The claim of appellants' counsel is that, conceding the truth of Warner's statement, the force or violence used in taking the \$10 bill from him was not sufficient to constitute the crime of robbery. Authorities on criminal law and the decisions of the courts, while they differ somewhat in their verbiage, in substance define the offense of robbery to be the felonious taking of property from the person of another against his will, by force, violence, or putting the person in fear. As to the extent of the force necessary to be used to constitute the crime, the courts of different states are not in accord, and the appellants' counsel cites several cases from other states which seem to support his contention; but this court has determined that the felonious taking of property from a person against

⁷ Arguments of counsel and part of the opinion are omitted.

his will, by force or violence, however slight, constitutes the offense. In the case of *Snyder v. Commonwealth*, 55 S. W. 679, 21 Ky. Law 1538, this court said: "While to pick one's pocket without the use of some force or violence, or putting in fear, is not robbery, yet if the victim is being pushed or shoved about by the pickpocket or his associate for the purpose of diverting his attention, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss. 1 Roberson's Ky. Cr. Law, § 290, and cases cited there." In the case of *Jones v. Commonwealth*, 112 Ky. 689, 66 S. W. 633, 57 L. R. A. 432, 99 Am. St. 330, the prosecuting witness, Eckler, testified as follows: "I was holding my pocketbook in my left hand, and had my right hand in it, and Jones grabbed it out of my hand and ran up the alley." In that case the court said: "It is true that the witness did not state that he was put in fear, nor that he tried to hold onto the pocketbook. He does not appear to have been asked specially on these points. In fact, the snatching or grabbing and jerking of the pocketbook out of witness' hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force." See, also, the cases of *Davis v. Commonwealth*, 54 S. W. 959, 21 Ky. Law Rep. 1295; *Perry v. Commonwealth*, 85 S. W. 732, 27 Ky. Law Rep. 512, and *Williams v. Commonwealth*, 50 S. W. 240, 20 Ky. Law Rep. 1850. * * *

For these reasons, the judgment of the lower court is affirmed.⁸

O'DONNELL v. PEOPLE.

1906. SUPREME COURT OF ILLINOIS. 224 Ill. 218, 79 N. E. 639, 8 Ann. Cas. 123.

Writ of error to the Criminal Court of Cook County; the TON. JOHN GIBBONS, Judge, presiding.

Plaintiff in error was jointly indicted with John E. Mulholland, by the grand jury of Cook county, for an assault with an intent to rob Joseph E. Dorgan. * * * A trial was had, resulting in

⁸ Accord: *State v. Carr*, 43 Iowa 418; *Jones v. Commonwealth*, 112 Ky. 689, 23 Ky. L. 2081, 66 S. W. 633, 51 L. R. A. 432, 99 Am. St. 330; *Pride v. State*, 125 Ga. 750, 54 S. E. 688; contra, holding that mere snatching from the person of another is not robbery, *People v. Hall*, 6 Park. Cr. (N. Y.) 642; *Bonsall v. State*, 35 Ind. 460; *Johnson v. State*, 35 Tex. Cr. 140, 32 S. W. 537; *State v. Sommers*, 12 Mo. App. 374; *State v. John*, 50 N. Car. 163, 69 Am. Dec. 777; unless the property be attached to the person, *People v. Campbell*, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. 107; *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176.

the conviction and sentence of plaintiff in error to the penitentiary for an indeterminate term, in accordance with the verdict.

The evidence on behalf of the People shows that about 12:15 o'clock on the morning of March 21, 1906, Mulholland, a man who is known by the name of "Curley," and plaintiff in error went to the ticket office of the Western Indiana railroad elevated station at Forty-seventh street and Western Indiana tracks. They had previously planned a raid on this station with the intention of blowing a safe therein and stealing its contents. The evidence shows that the plaintiff in error had located the safe some time before this and that he was the chief conspirator in the criminal enterprise. Upon arriving at the station plaintiff in error and "Curley" advanced to the door of the station, leaving Mulholland about twenty paces away as a watch. The prosecuting witness, Joseph E. Dorgan, was a watchman and was inside the station, and when plaintiff in error and his confederate approached the door Dorgan opened the door, and one of the men inquired about the Wabash train. Dorgan positively identified plaintiff in error as the person who inquired of him concerning the train. One of the men then jumped into the waiting room and grabbed Dorgan and a struggle ensued, in which two or three shots were fired, and one of the assaulting party called out, "Come on, John." Dorgan succeeded in getting a pistol in the office and the parties were frightened away, running north and west into the Wabash yards. * * *

Mr. Justice Vickers delivered the opinion of the court⁹:

* * * * *

It is earnestly contended on behalf of plaintiff in error that there was no evidence sufficient to go to the jury upon the specific intent charged in this indictment. The argument of plaintiff in error is, that the intent with which the alleged assault was committed was not, forcibly and by intimidation, to steal from the person of Joseph T. Dorgan, and that, even though the evidence is sufficient to show, beyond a reasonable doubt, that the assault was committed with an intent to burglarize the station building or to steal from the safe therein, such proof will not sustain a conviction for an assault to rob Joseph E. Dorgan. Plaintiff in error contended, and asked the court to instruct the jury, that in order to convict the defendant of the crime of assault with intent to rob, the jury must believe beyond every reasonable doubt that the assault was committed with the specific intent and for the purpose of robbing said Dorgan of his goods and chattels then and there being on his person. The court below overruled a motion to direct a verdict, and also refused instruction No. 25, which presented the theory of plaintiff in error on this point.

Robbery, at common law, is defined to be "the felonious and

⁹ Part of the statement of facts and of the opinion are omitted.

violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." (1 Hale's P. C. 532.) Another definition is: "A felonious taking of money or goods, to any value, from the person of another or in his presence, against his will, by violence or putting him in fear." (2 East's P. C. 707.) It is said, to constitute robbery, the taking must be from the person of another, and theoretically this is true. (*Stegar v. State*, 39 Ga. 583; *People v. Beck*, 21 Cal. 385; *State v. Leighton*, 56 Iowa 595.) But the taking from the person is not understood to mean that the goods are actually on the person, in a strict sense. At common law, if property was taken feloniously, with force and violence or by putting in fear, in the presence of the owner, it was, in legal contemplation, a taking from his person (1 Hale P. C. 532; *Rex v. Francis*, 2 Strange 1015; *State v. Calhoun*, 72 Iowa 432; *Clements v. State*, 84 Ga. 660; *Crawford v. State*, 90 Ga. 701; *Turner v. State*, 1 Ohio St. 422; *Hill v. State*, 42 Neb. 503; *Croker v. State*, 47 Ala. 53; *Houston v. Commonwealth*, 87 Va. 257.) It is not necessary that the taking should be immediately from the person, so there be violence to his person or by putting him in fear and a taking in his presence. Where train robbers drove an express messenger out of his car and then blew open the safe and took the money therefrom it was held robbery. (*State v. Kennedy*, 154 Mo. 268; 55 S. W. 293.) In *Clements v. State*, *supra*, it was held that when a person was in his smoke-house, fifteen steps away from his dwelling, and the property in his dwelling was in his immediate possession and control, and he was prevented from leaving the smoke-house by threats or intimidation until the dwelling was entered and the property stolen therefrom, the offense was robbery. In *State v. Calhoun*, *supra*, the accused entered the dwelling house of a lady and by threats and violence extorted information from her as to her valuables, and then, leaving her tied in one room, went into another and took her watch and money. This was held to constitute robbery, being a taking in her presence. * * * Joseph E. Dorgan, being a watchman and in immediate charge and possession of the station and all the personal property therein contained, as against the plaintiff in error was the owner and in the possession of such property. If plaintiff in error and his confederates entered into a conspiracy to go into said station house and feloniously steal money or other valuable property therein, and if, upon arriving at said station house, they found the watchman there in charge of the property which they intended to steal, and if he was violently assaulted, for the purpose of overcoming his resistance or of putting him in fear, by the plaintiff in error with the intent to enable the conspirators to steal the money or other valuable thing then being in the possession and control of the said Dorgan, and were only intercepted and pre-

vented from accomplishing their purpose by the resistance of the said Dorgan, the offense would be an assault with intent to rob the said Dorgan, and would be complete without proof of a specific intent to steal money or goods that were actually on the person of the said Dorgan. * * *

The proof is clear, and beyond a reasonable doubt substantial justice has been done, and there is no error requiring the judgment to be reversed. It should be, and is accordingly, affirmed.

Judgment affirmed.

Section 4.—Rape.

COMMONWEALTH v. BURKE.

1870. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
105 Mass. 376, 7 Am. Rep. 531.

GRAY, J.—The defendant has been indicted and convicted for aiding and assisting Dennis Green in committing a rape upon Joanna Caton. The single exception taken at the trial was to the refusal of the presiding judge to rule that the evidence introduced was not sufficient to warrant a verdict of guilty. The instructions given were not objected to, and are not reported in the bill of exceptions. The only question before us therefore is whether, under any instructions applicable to the case, the evidence would support a conviction.

The evidence, which it is unnecessary to state in detail, was sufficient to authorize the jury to find that Green, with the aid and assistance of this defendant, had carnal intercourse with Mrs. Caton, without her previous assent, and while she was, as Green and the defendant both knew, so drunk as to be utterly senseless and incapable of consenting, and with such force as was necessary to effect the purpose.

All the statutes of England and of Massachusetts, and all the text-books of authority, which have undertaken to define the crime of rape, have defined it as having carnal knowledge of a woman by force and against her will. The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is, Was the woman willing or unwilling? The earlier and more weighty authorities show that the words "against her will," in the standard definitions, mean exactly the same thing as "without her consent"; and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded.

The most ancient statute upon the subject is that of Westm. I, ch. 13, making rape (which had been a felony at common law) a

misdemeanor, and declaring that no man should "ravish a maiden within age, neither by her own consent, nor without her consent, nor a wife or maiden of full age, nor other woman, against her will," on penalty of fine and imprisonment, either at the suit of a party or of the king. The St. of Westm. II, ch. 34, ten years later, made rape felony again, and provided that if a man should "ravish a woman, married, maiden, or other woman, where she did not consent, neither before nor after," he should be punished with death, at the appeal of the party; "and, likewise, where a man ravisheth a woman, married lady, maiden, or other woman, with force, although she consent afterwards," he should have a similar sentence upon prosecution in behalf of the king.

It is manifest upon the face of the Statutes of Westminster, and is recognized in the oldest commentaries and cases, that the words "without her consent" and "against her will" were used synonymously; and that the second of those statutes was intended to change the punishment only, and not the definition of the crime, upon any indictment for rape—leaving the words "against her will," as used in the first statute, an accurate part of the description. *Mirror*, ch. 1, § 12; ch. 3, § 21; ch. 5, § 5; 30 and 31 Edw. I, 529-532; 22 Edw. IV, 22. *Staunf. P. C.* 24a. Coke treats the two phrases as equivalent; for he says: "Rape is felony by the common law declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will or against her will"; although in the latter case the words of the Statute of Westm. I (as we have already seen) were "neither by her own consent, nor without her consent." 3 *Inst.* 60. Coke elsewhere repeatedly defines rape as "the carnal knowledge of a woman by force and against her will." *Co. Lit.* 123b; 2 *Inst.* 180. A similar definition is given by Hale, Hawkins, Comyn, Blackstone, East and Starkie, who wrote while the Statutes of Westminster were in force; as well as by the text writers of most reputation since the Statute of 9 Geo. IV, ch. 31, repealed the earlier statutes, and, assuming the definition of the crime to be well established, provided simply that "every person convicted of the crime of rape shall suffer death as a felon." 1 *Hale P. C.* 628; 1 *Hawk.* ch. 41, *Com. Dig.* Justices, § 2; 4 *Bl. Com.* 210; 1 *East P. C.* 434; *Stark. Crim. Pl.* (2d ed.) 77, 431; 1 *Russell on Crimes* (2d Am. ed.) 556; (7th Am. ed.) 675; 3 *Chit. Crim. Law*, 810; *Archb. Crim. Pl.* (10th ed.) 481; 1 *Gabbett Crim. Law*, 831. There is authority for holding that it is not even necessary that an indictment, which alleges that the defendant "feloniously did ravish and carnally know" a woman, should add the words "against her will." 1 *Hale P. C.* 632; *Harman v. Commonwealth*, 12 S. & R. 69; *Commonwealth v. Fogerty*, 8 Gray 489. However that may be, the office of those words, if

inserted, is simply to negative the woman's consent. Stark. Crim. Pl. 431, note.

In the leading modern English case of *The Queen v. Camplin*, the great majority of the English judges held that a man who gave intoxicating liquor to a girl of thirteen, for the purpose, as the jury found, "of exciting her, not with the intention of rendering her insensible, and then having sexual connection with her," and made her quite drunk, and, while she was in a state of insensibility, took advantage of it, and ravished her, was guilty of rape. It appears indeed by the judgment delivered by Patterson, J., in passing sentence, as reported in 1 Cox Crim. Cas. 220, and 1 C. & K. 746, as well by the contemporaneous notes of Parke, B., printed in a note to 1 Denison 92, and of Alderson, B., as read by him in *The Queen v. Page*, 2 Cox Crim. Cas. 133, that the decision was influenced by its having been proved at the trial that, before the girl became insensible, the man had attempted to procure her consent, and had failed. But it further appears by those notes that Lord Denman, C. J., Parke, B., and Patterson, J., thought that the violation of any woman without her consent, while she was in a state of insensibility and had no power over her will, by a man knowing at the time that she was in that state, was a rape, whether such state was caused by him or not; for example, as Alderson, B., adds, "in the case of a woman insensibly drunk in the streets, not made so by the prisoner." And in the course of the argument this able judge himself said that it might be considered against the general presumable will of a woman that a man should have unlawful connection with her. The later decisions have established the rule in England that unlawful and forcible connection with a woman in a state of unconsciousness at the time, whether that state has been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape. *The Queen v. Ryan*, 2 Cox Crim. Cas. 115. Anon. by Willes, J., 8 *id.* 134; *Regina v. Fletcher*, *id.* 131; s. c. Bell 63; *Regina v. Jones*, 4 Law Times (N. S.) 154; *The Queen v. Fletcher*, Law Rep. 1 C. C. 39; s. c. 10 Cox Crim. Cas. 248; *The Queen v. Barrow*, Law Rep. 1 C. C. 156; s. c. 11 Cox Crim. Cas. 191. Although, in *Regina v. Fletcher*, *ubi supra*, Lord Campbell, C. J. (ignoring the old authorities and the repealing statute of 9 Geo. IV), unnecessarily and erroneously assumed that the Statute of Westm. II was still in force; that it defined the crime of rape; and that there was a difference between the expressions "against her will" and "without her consent," in the definitions of this crime; none of the other cases in England have been put upon that ground, and their judicial value is not impaired by his inaccuracies.

The earliest statute of Massachusetts upon the subject was passed in 1642, and, like the English Statutes of Westminster, used "with-

out consent" as synonymous with "against her will," as is apparent upon reading its provisions, which were as follows: 1st. "If any man shall unlawfully have carnal copulation with any woman child under ten years old, he shall be put to death, whether it were with or without the girl's consent." 2d. "If any man shall forcibly and without consent ravish any maid or woman that is lawfully married or contracted, he shall be put to death." 3d. "If any man shall ravish any maid or single woman, committing carnal copulation with her by force, against her will, that is above the age of ten years, he shall be either punished with death, or with some other grievous punishment, according to circumstances, at the discretion of the judges." 2 Mass. Col. Rec. 21. Without dwelling upon the language of the first of these provisions, which related to the abuse of female children, it is manifest that in the second and third, both of which related to the crime of rape, strictly so called, and differed only in the degree of punishment, depending upon the question whether the woman was or was not married or engaged to be married, the legislature used the words "without consent," in the second provision, as precisely equivalent to "against her will," in the third. The later revisions of the statute have abolished the difference in punishment, and, therefore omitted the second provision, and thus made the definition of rape in all cases the ravishing and carnally knowing a woman "by force and against her will." Mass. Col. Laws (ed. 1660) 9; (ed. 1672) 15; Mass. Prov. Laws, 1692-3 (4 W. & M.), ch. 19, § 11; 1697 (9 W. III), ch. 18; (State ed.) 56, 296; Stats. 1805, ch. 97, § 1; Rev. Stats., ch. 125, § 18; Gen. Stats., ch. 160, § 26. But they can not, upon any proper rule of construction of a series of statutes *in pari materia*, be taken to have changed the description of the offense. *Commonwealth v. Sugland*, 4 Gray 7; *Commonwealth v. Bailey*, 13 Allen 541, 545.

We are therefore unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.

Exceptions overruled.¹⁰

¹⁰ Accord: *Rahke v. State*, 168 Ind. 615, 81 N. E. 584; *State v. Green*, 2 Ohio Dec. (reprint). Consent to intercourse obtained by fear of great bodily injury is no defense to a charge of rape; *Shepherd v. State*, 135 Ala. 9, 33 So. 266; *Rahke v. State*, supra; *Smith v. Commonwealth*, 119 Ky. 280, 26 Ky. L. 1229, 83 S. W. 647; but consent obtained by fraud is gen-

Section 5.—Homicide.

"Now homicide, or the killing of any human creature, is of three kinds; justifiable, excusable, and felonious. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing. 1. Justifiable homicide is of divers kinds. Such as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame, as, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. * * *

Again, in some cases homicide is justifiable rather by the permission than by the absolute command of the law, either for the advancement of public justice, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the prevention of some atrocious crime which can not otherwise be avoided. * * *

Excusable homicide is of two sorts; either *per infortunium*, by misadventure, or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

Homicide *per infortunium* or misadventure is where a man, doing a lawful act without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. * * *

Homicide in self-defence or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital

erally held to be a defense, *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283; *State v. Brooks*, 76 N. Car. 1, but see *Pomeroy v. State*, 94 Ind. 96, 48 Am. Rep. 146. Rape is not committed if the woman does not offer physical resistance, unless resistance would be useless or dangerous. *Rucker v. People*, 224 Ill. 131, 79 N. E. 606; *Rahke v. State*, supra; *Perez v. State*, 50 Tex. Cr. 34, 94 S. W. 1036.

crime; which is not only a matter of excuse but of justification. But the self-defense which we are now speaking of is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word chance-medley. * * * It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper legal sense of the word. But the true criterion between them seems to be this: When both parties are actually combatting at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense. For which reason the law requires that the person who kills another in his own defense should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant. * * *

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the offense into manslaughter and murder. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

Manslaughter is therefore thus defined, the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. * * *

As to the first, or voluntary branch: If, upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter; and so it is if they, upon such an occasion, go out and fight in a field; for this is one continued act of passion; and the law pays that regard to human frailty as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice; but is manslaughter. But in this and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder. So, if a man takes another in the act of adultery with his wife and kills him directly upon the spot * * * it is manslaughter. * * *

The second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As, if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done; if it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous towns, where people are continually passing, it is manslaughter, though he gives loud warning; and murder if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. * * *

We are next to consider the crime of deliberate and wilful murder; a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world with death. * * * Murder is now thus defined or rather described by Sir Edward Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by a person of sound memory and discretion; for lunatics or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.

Next it happens when a person of such sound discretion unlawfully killeth. The unlawfulness arises from the killing without warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanour, though it formerly was held to be murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. * * * Further, the person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing. * * * To kill a child in its mother's womb is now no murder, but a great misprision. * * *

Lastly, the killing must be committed with malice aforethought, to make it the crime of murder. This is the grand criterion which

now distinguishes murder from other killing; and this malice pre-pense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart; *un disposition a faire un male chose* (a disposition to commit a bad action); and it may be either express or implied in law. Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. * * *

Also in many cases where no malice is expressed the law will imply it, as, where a man wilfully poisons another; in such deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable, provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. * * * And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus, if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other." * * * 4 Black. Com., §§ 178-201.

(A) MURDER.

UNITED STATES v. OUTERBRIDGE.

1868. UNITED STATES CIRCUIT COURT. 5 Sawy. (U. S.) 620,
27 Fed. Cas. No. 15978.

From the charge of FIELD, J., to the jury:

* * * * *
The prisoner at the bar is indicted for the crime of murder.
* * * The act of congress under which this indictment is found provides what the punishment shall be for this crime; it declares that the punishment shall be death. But it does not define the crime itself, nor establish any degrees in the turpitude of the offense, as does the law of the state. There is no such designation made in the laws of the United States as murder in the first or murder in the second or any other degree. The statute simply enacts that if any person upon the high seas, or in any arm of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder, such person shall, upon conviction thereof,

suffer death. We must therefore resort to the common law for a definition of the crime. In the absence of statutory provisions, the federal courts are obliged to resort to that law for guide in the construction of legal terms and phrases. By that law murder is defined to be the wilful killing of a human being in the peace of the country, with malice aforethought, either express or implied. The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad and unjustifiable motive. Express malice exists when one, with deliberate premeditation and design formed in advance, kills another, such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes to do the party bodily harm. Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus it is implied when one man kills another without provocation, or when the provocation is not great, for no person except one of an abandoned heart could be guilty of such an act without cause, or upon any slight cause. The terms express and implied malice, in truth, indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide, and the other being inferred only from the act committed.

Manslaughter is the unlawful killing of a human being without malice, express or implied. It may be voluntary or involuntary. It is voluntary when committed with a design to kill, under the influence of a sudden and violent passion caused by great provocation, which the law, in its tenderness to the infirmity of human nature, considers such a palliative of the offense as to rebut the presumption which would otherwise arise of malice. Manslaughter is involuntary when committed by accident, or without any intention to take life. As you will thus perceive, the difference between murder and manslaughter consists in the existence of malice, express or implied, in the one case, and the absence of malice in the other.

Now, malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death. If there are any circumstances of excuse or palliation which will rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man can not strike another violently with a bar of iron without inflicting bodily pain; if, therefore, he does thus strike another, the law presumes that he intended thus to inflict pain. The usual effect of a leaden ball fired from a loaded pistol of the common size, at a distance of a few feet only, striking the head or back of a person, is to kill such person; the

law therefore presumes that every one who thus fires a loaded pistol within a few feet of the object intends to kill; it therefore implies malice in him. * * *

REGINA v. GREENWOOD.

1857. LIVERPOOL WINTER ASSIZES. 7 Cox Cr. C. 404.

The prisoner was indicted for murder and rape on a child under ten. It appeared from the evidence that the prisoner had connexion with the deceased, and that it was afterwards discovered she had the venereal disease.

WIGHTMAN, J., told the jury that the malice, which constitutes murder, might be either express or implied. There was no pretence in this case that there was any malice other than what might be implied by law. There were five questions for them to consider.

First, had the prisoner connexion with her?

Secondly, did she die therefrom?

Thirdly, had she the venereal disease?

Fourthly, did she die from its effects?

Fifthly, did she get it from the prisoner?

If they were of opinion that the prisoner had connexion with her, and she died from its effects, then that act being, under the circumstances of this case, a felony in point of law, this would, of itself, be such malice as would justify them in finding him guilty of murder.

The jury retired, and, after some time, returned into court saying that they were satisfied that he had connexion, and that her death resulted therefrom, but were not agreed as to finding him guilty of murder.

WIGHTMAN, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit.

The jury found a verdict of manslaughter, and the prisoner was ordered to be kept in penal servitude for life.

REGINA v. SERNE.

1887. CENTRAL CRIMINAL COURT. 16 Cox Cr. C. 311.

The prisoners Leon Serné and John Henry Goldfinch were indicted for the murder of a boy, Sjaak Serné, the son of the pris-

oner Leon Serné, it being alleged that they wilfully set on fire a house and shop, No. 274, Strand, London, by which act the death of the boy had been caused.

It appeared that the prisoner Serné, with his wife, two daughters and two sons, were living at the house in question; and that Serné, at the time he was living there, in midsummer, 1887, was in a state of pecuniary embarrassment, and had put into the premises furniture and other goods of but very little value, which at the time of the fire were not of greater value than £30. It also appeared that previously to the fire the prisoner Serné had insured the life of the boy, Sjaak Serné, who was imbecile, and on the 1st day of September, 1887, had insured his stock at 274, Strand, for £500, his furniture for £100, and his rent for another £100; and that on the 17th of the same month the premises were burned down.

Evidence was given on behalf of the prosecution that fires were seen breaking out in several parts of the premises at the same time, soon after the prisoners had been seen in the shop together; two fires being in the lower part of the house and two above, on the floor whence escape could be made onto the roof of the adjoining house, and in which part were the prisoners and the wife and two daughters of Serné, who escaped. That on the premises was a quantity of tissue transparencies for advertising purposes, which were of a most inflammable character; and that on the site of one of the fires was found a great quantity of these transparencies close to other inflammable materials. That the prisoner Serné, his wife and daughters, were rescued from the roof of the adjoining house, the other prisoner being rescued from a window in the front of the house, but that the boys were burned to death, the body of the one being found on the floor near the window from which the prisoner Serné, his wife and daughters, had escaped, the body of the other being found at the basement of the premises.

STEPHEN, J.—Gentlemen, it is now my duty to direct your attention to the law and the facts into which you have to inquire. The two prisoners are indicted for the wilful murder of the boy, Sjaak Serné, a lad of about fourteen years of age; and it is necessary that I should explain to you, to a certain extent, the law of England with regard to the crime of wilful murder, inasmuch as you have heard something said about constructive murder. Now that phrase, gentlemen, has no legal meaning whatever. There was wilful murder according to the plain meaning of the term, or there was no murder at all in the present case. The definition is unlawful homicide with malice aforethought; and the words malice aforethought are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided

cases, which have given them meanings different from those which might be supposed. One of those meanings is, the killing of another person by an act done with an intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person. Now it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony, that is to say, the setting of the house on fire in order to cheat the insurance company, or by conduct which, to their knowledge, was likely to cause death, and was therefore eminently dangerous in itself—in either of these cases the prisoners are guilty of wilful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart, or some other internal disorder, dies. To take another very old illustration, it was said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so. The present case, however, is not such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, whilst that part of the law under which the Crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that everyone would say in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or

a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places, and thereby burned two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. If a person chose, for some wicked purpose of his own, to sink a boat at sea, and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burned to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying the law of England lays down a rule of broad, plain, common sense. Treat a murderer how you will, award him what punishment you choose, it is your duty, gentlemen, if you think him really guilty of murder, to say so. That is the law of the land, and I have no doubt in my mind with regard to it. There was a case tried in this court which you will no doubt remember, and which will illustrate my meaning. It was the Clerkenwell explosion case in 1868, when a man named Barrett was charged with causing the death of several persons by an explosion which was intended to release one or two men from custody; and I am sure that no one can say truly that Barrett was not justly hanged. With regard to the facts in the present case, the very horror of the crime, if crime it was, the abomination of it, is a reason for your taking the most extreme care in the case, and for not imputing to the prisoners anything which is not clearly proved. God forbid that I should, by what I say, produce on your minds, even in the smallest degree, any feeling against the prisoners. You must see, gentlemen, that the evidence leaves no reasonable doubt upon your minds; but you will fail in the performance of your duty if, being satisfied with the evidence, you do not convict one or both the prisoners of wilful murder, and it is wilful murder of which they are accused. [The learned judge then proceeded to

review the evidence. In the result the jury found a verdict of not guilty in respect of each of the prisoners.]

Verdict, not guilty.

PEOPLE v. HUTHER.

1906. COURT OF APPEALS OF NEW YORK. 184 N. Y. 237, 77 N. E. 6.

Appeal from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered May 20, 1904, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

HAIGHT, J.—Between four and five o'clock on the morning of March 20, 1905, the defendant broke into the bake-shop of Paul Scheel, located in the basement of premises No. 901 Third avenue, between Fifty-fourth and Fifty-fifth streets in the city of New York. At the time he had a horse and wagon stationed in front of the premises, in the care of one Joseph Pesce. He had removed from the bake-shop a crate of eggs and placed it in the wagon, and had returned to the shop to get another crate, when he was discovered by a private watchman. The defendant, on discovery, ran out of the premises and told Pesce to run, and they both abandoned the property stolen, as well as the horse and wagon, and ran northwardly along the east side of Third avenue to the corner of Fifty-fifth street, pursued by the watchman. The watchman had a night stick, and as he started to pursue the defendant he called for help, sounding his stick upon the walk, and then, seeing Police Officer Enright upon the opposite corner of Fifty-fifth street, called to him to arrest the burglar. At the corner of Third avenue and Fifty-fifth street the defendant and Pesce separated, Pesce going westerly along Fifty-fifth street, while the defendant ran easterly. But by this time Police Officer Enright and a private citizen named Felix Stegman took up the pursuit of the defendant, the policeman calling upon him to stop or he would shoot. After running about three hundred feet upon Fifty-fifth street the policeman had so gained upon the defendant that he was but a few feet distant from him when the defendant suddenly drew his revolver and shot the policeman, producing a wound from which he died within a few hours.

In submitting the case to the jury the trial judge called the attention of the jurors to the definition of murder in the first degree, and after instructing them that in case they found that it was the deliberate and premeditated design of the defendant to kill Officer Enright in shooting him in the manner described that it constituted

murder in the first degree; but that in case the defendant did not intend to kill Officer Enright, and that the killing was without premeditation or deliberation, yet if the jurors find that he fired the shot at Enright which proved fatal after he had attempted to or had burglarized the premises of Scheel and was attempting to escape from the premises in the manner described by the witnesses, then their verdict ought to be for murder in the first degree. The defendant's counsel took an exception to the instruction of the court with reference to their right to convict if they found that the killing took place while he was engaged in the commission of a felony. This presents the only question which we are called upon to review.

Under the provisions of § 183 of the Penal Code it is murder in the first degree if the killing of a person is not excusable or justifiable when committed from a deliberate and premeditated design to effect the death of the person killed, or of another; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise. The evidence in the case amply warranted the trial court in submitting to the jury the question of the defendant's guilt under the first subdivision of the section referred to; for, it distinctly appears that before the defendant undertook the burglary upon Scheel's premises he provided himself with a loaded revolver and carried it upon his person. It was not an implement which would aid him in breaking into the premises, or in securing the property therein. The only use to which he could have well devoted it was to aid him in escaping in case he was discovered, and it is apparent that that was the use for which he designed it. I think, therefore, that the jury, under the circumstances of this case, would have been justified in finding the deliberate and premeditated design of the defendant to effect the death of any person who should attempt to prevent his escape from the premises in which the burglary was committed, and, in so far as the court charged upon this provision of the Code, no question is now raised as to its correctness. (*People v. Sullivan*, 173 N. Y. 122.) But, as we have seen, the trial court also submitted another provision of the Code to the jury, and instructed them to determine whether or not the defendant was guilty under that provision. The defendant had committed a burglary, and if the death of Enright had been caused by him while engaged in the commission of that crime it would, undoubtedly, have been murder in the first degree; but, as we have seen, after he was discovered by the watchman he immediately ran from the premises, abandoning all of the property which he had stolen, and attempted to escape arrest. It is true that he was immediately pursued by the watchman and by Officer Enright, but we incline to the view that this did not operate to continue the burglary after the defendant had abandoned the property that

he undertook to carry away and had escaped from the premises burglarized. In all of the cases to which our attention has been called, in which persons have been convicted of murder in the first degree by reason of the killing of a person while the accused was engaged in the commission of a burglary, the killing took place upon the premises.¹¹

In the case of *People v. Meyer* (162 N. Y. 357) the defendant had broken into a church and had taken away the money from the poor box. His presence in the church was made known through an electric appliance connected with the box, which gave notice to an adjoining building. He was immediately sought for by a policeman and others, and on discovering their search he retreated through the church, out of a door at the rear of the altar into an alleyway which led to a school building which was used in connection with the church. The policeman followed him into the school room and there was shot and killed, after which the defendant broke out one of the windows and jumped to the street. In that case it was held that the defendant was properly convicted of the killing while engaged in the commission of a burglary. But the act, as we have seen, was committed while he was still upon the property in one of the adjacent buildings and before he had broken out onto the street. He was, therefore, still engaged in the burglary.

In the case of *Dolan v. People* (64 N. Y. 485, 487), Earl, J., in delivering the opinion of the court, says: "If a burglar break into a dwelling house burglariously, with the intent to steal, the offense is doubtless complete before he leaves the building, but he may be said to be engaged in the commission of the crime until he leaves the building with his plunder; and if, while there engaged in securing his plunder, or in any way or in any of the acts immediately connected with his crime, he kills any one resisting him, he is guilty of murder under the statute." We, consequently, conclude that at the time of the killing of Enright he had ceased to be engaged in the commission of a burglary.

The trial court, as we have seen, instructed the jury that if they found that Officer Enright was killed by the defendant while attempting to escape from the premises of Scheel in the manner described by the witnesses, that then their verdict might be for murder in the first degree. The defendant had committed a burglary. He had been discovered in the act. He was pursued by the watchman and by the policeman. He, therefore, knew that Officer Enright had the right to arrest him and when he found that he was about to be overtaken he drew his revolver and fired at the officer. By so doing he not only resisted arrest, but he committed another felony under § 218, subdivision 5, of the Penal Code, which provides that a person who assaults another to prevent or resist the execu-

¹¹ *Contra*, *State v. Brown*, 7 Ore. 186.

tion of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, is an assault in the second degree. Such an assault is made a felony and is punishable by imprisonment for not exceeding five years. The trial judge, in his charge, did not specifically call the attention of the jurors to this provision of the Code, or charge that the defendant might be convicted thereunder. Possibly he had it in mind, but we think he did not so express himself with reference thereto as to call upon the jurors to determine the question of the defendant's guilt or innocence thereunder. But, inasmuch as we have concluded to order a new trial, in which the question will doubtless be raised, we have concluded to consider the force and effect of the provision as bearing upon the charge.

Assuming for the purpose of the argument that the defendant in firing the shot did not intend to kill, but only intended to frighten or so wound the officer as to prevent his effecting the defendant's arrest, still we have the fact that the shot caused the death of the officer. The killing, therefore, was done by the defendant while he was actually engaged in the commission of a felony. But, notwithstanding this, a much mooted question arises in our minds as to whether the felony in which he was engaged at the time of the killing is merged in and became a part of the greater offense.

A person who attempts or engages in the commission of a felony, is not only chargeable with express malice, but also with being perversely wicked, evincing a depraved mind and a disregard of human life, and if, while so engaged, he causes the death of a person, although unintentional, the legislature has seen fit to enlarge the crime and make it murder in the first degree, so that, if a person engaged in the commission of a rape and in order to accomplish the act resorts to violence, from which death is unintentionally produced and which would be only manslaughter were it not for the malice, wickedness and intent to rape, yet by reason thereof it is made murder in the first degree. (*Buel v. People*, 78 N. Y. 492.) The same is true with reference to the unintentional killing of a person while engaged in the commission of a robbery, a burglary or an attempt to escape from imprisonment. There may be no intent to kill, but the violence having been perpetrated while engaged in the robbery, burglary or attempt to escape imprisonment, it is murder in the first degree. (*Cox v. People*, 80 N. Y. 500; *People v. Flanigan*, 174 N. Y. 356; *People v. Johnson*, 110 N. Y. 134.) On the other hand, it has been held, where the defendant seized a car hook and struck a person over the head on alighting from a street car, thus crushing his skull, which resulted in death, that the assault and battery was merged in the crime of murder and that the request to charge that the act was done in the commission of a felony was properly refused. (*Foster v. People*, 50 N. Y. 598. See, also, *People v. Rector*,

19 Wend. 569, and *People v. Butler*, 3 Parker Cr. R. 377.) In order, therefore, to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that while the violence may constitute a part of the homicide, yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder. (*Buel v. People*, 18 Hun 487, 493; affirmed, 78 N. Y. *supra*.) Was the assault, therefore, in this case upon the officer a separate and independent felony from that of the homicide, or did it form a part of and become the chief ingredient of that crime? Under the provisions of the Penal Code, to which we have called attention, it is provided that a person who assaults an officer to prevent or resist the lawful apprehension of himself commits a felony. A person may prevent an arrest by hiding; he may resist in various ways without assaulting or using violence. It is apparent, therefore, that the *gist* of the offense is the assault and when it is by violence inflicting an injury to the person so assaulted, resulting in death, the act becomes a constituent part of the homicide and is merged in the charge therefor. It does not follow, however, that in the other felonies, in order to bring the case within the statute defining murder, the act which caused death must be a different one from that done in the commission of the collateral felony. By the same act one may commit two crimes, and to constitute murder in the first degree, as in the commission of a felony, it is not necessary that there should be an act collateral to or independent of that which causes the death; but if the act causing the death be committed with a collateral and independent felonious design it is sufficient; thus, if the violence used to commit a rape or a robbery results in death the case is plainly within the statute, and so this court has held in the cases above referred to. But as to the felony under consideration we think it was merged in the homicide.

The judgment and conviction should be reversed and a new trial granted.

Cullen, Ch. J., Werner, Willard Bartlett and Hiscock, JJ., concur; O'Brien and Vann, JJ., concur, except as to the point last discussed in the opinion, as to which they express no opinion.

Judgment of conviction reversed, etc.

COMMONWEALTH v. CLEARY.

1890. SUPREME COURT OF PENNSYLVANIA. 135 Pa. St. 64,
19 Atl. 1017, 8 L. R. A. 301.

* * * At the close of the testimony, the court, Mayer, P. J., charged the jury in part as follows:¹²

That Philip Paul was killed by the hand of violence on the night of March 12, 1889, at Renovo, in this county, and that the perpetrator of the crime was the prisoner, Charles Cleary, is not questioned by the counsel for the prisoner, but it is contended and urged that, by reason of the intoxication of the prisoner, at the time of the commission of the act, the crime of which the prisoner is guilty is of no higher grade than murder in the second degree. This concession of the prisoner's counsel will simplify the inquiry on the part of the jury and limit their investigations to the ascertainment and determination of the grade or degree of crime of which, under the evidence, the defendant should be convicted. It will, therefore, become necessary for the court to explain to the jury, as clearly and correctly as we can, the distinguishing characteristics between murder in the first and murder in the second degree.

Murder, as defined by the common law, is where a person of sound memory and discretion unlawfully kills any reasonable creature in being and in the peace of the commonwealth, with malice prepense or aforethought, either express or implied. The distinguishing criterion of murder is malice aforethought. But it is not malice in its ordinary understanding alone—a particular ill-will, a spite or a grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill-will, but every case where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law, embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.

In Pennsylvania, the legislature, considering that there was a manifest difference in the degree of guilt where a deliberate intention to kill exists and where none appears, distinguished murder into two grades, murder of the first and murder of the second degree; and provided that the jury before whom any person indicted for murder should be tried shall, if they find him guilty thereof, ascertain in their verdict whether it be murder of the first or murder of the

¹² The statement of facts, part of the charge to the jury, and the opinion of the appellate court are omitted. The conviction was reversed for an erroneous instruction to the jury on the subject of evidence of good character.

second degree. By the act of March 31, 1860, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree." [When not committed in the perpetration of or attempt to perpetrate any one of the felonies named in the statute, the intention to kill is the essence of murder in the first degree.]

Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in evidence. A learned judge has said: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it." But this expression must be qualified, lest it mislead. It is true that such is the swiftness of human thought that no time is so short in which a wicked man may not form a design to kill and frame the means of executing his purpose, yet this suddenness is opposed to premeditation and the jury must be well convinced, upon the evidence, that there was time to deliberate and premeditate. The law regards, and the jury must find, the actual intent; that is to say, the fully-formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and premeditate.

The proof of the intention to kill, and of the disposition of the mind constituting murder of the first degree, under the act of assembly, lies on the commonwealth. But this proof need not be express or positive. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably and satisfactorily infer the existence of the intention to kill, and the malice of heart with which it was done, they will be warranted in so doing. He who uses upon the body of another, at some vital part, with manifest intention to use it upon him, a deadly weapon,

as an axe, a gun, a knife or pistol, must, in the absence of qualifying facts, be presumed to know that his blow is likely to kill, and, knowing this, must be presumed to intend the death, which is the probable and ordinary consequence of such an act. He who so uses a deadly weapon, without a sufficient cause of provocation, must be presumed to do it wickedly, or from a bad heart. Therefore, he who takes the life of another with a deadly weapon, and with a manifest design thus to use it upon him, with sufficient time to deliberate and fully to form the conscious purpose of killing, and without any sufficient reason or cause of extenuation, is guilty of murder in the first degree.

Murder in the second degree is where a felonious and malicious homicide is committed, but without any specific intention to take life. All murder not of the first degree is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart, and a disposition of mind regardless of social duty, but where no intention to kill exists, or can be reasonably or fully inferred; therefore in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder in the second degree. * * *

It, therefore, lies on the commonwealth to satisfy the jury of those facts and circumstances which indicate a deliberate intention to kill, and the cool depravity of heart and conscious purpose which constitutes, as before stated, the crime of murder in the first degree. And in the solution of the question of the intent with which the act was done, the nature of the weapon and the place and character of the wound are matters to be considered by the jury. The deadliness of the weapon tends to indicate the intent with which it was used. And, as evidence bearing also upon the question of intent, the commonwealth has introduced the testimony of witnesses going to show that, prior to the commission of the crime, the prisoner made threats at different times and to different persons that he would take the life of the deceased. * * *

["The jury returned a verdict of guilty of murder in the first degree."]¹⁸

¹⁸ "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

"1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or,

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,

"3. When perpetrated in committing the crime of arson in the first degree."

"4. * * *

Such killing of a human being is murder in the second degree, when

(B) MANSLAUGHTER.

MAHER v. PEOPLE.

1862. SUPREME COURT OF MICHIGAN. 10 Mich. 212,
81 Am. Dec. 781.

CHRISTIANCY, J.¹⁴—Homicide, or the mere killing of one person by another, does not, of itself, constitute murder; it may be murder, or manslaughter, or excusable, or justifiable homicide, and therefore entirely innocent, according to the circumstances, or the disposition or state of mind or purpose, which induced the act. It is not, therefore, the act which constitutes the offense, or determines its character; but the *quo animo*, the disposition, or state of mind, with which it is done. *Actus non facit reum nisi mens sit rea*. People v. Pond, 8 Mich. 150.

To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice pre-pense or aforethought. * * * It is not necessary here to enumerate all the elements which enter into the legal definition of malice aforethought. It is sufficient to say that, within the principle of all the recognized definitions, the homicide must, in all ordinary cases, have been committed with some degree of coolness and deliberation, or, at least, under circumstances in which ordinary men, or the average of men recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion; and the act must be prompted by or the circumstances indicate that it sprung from a wicked, depraved or malignant mind—a mind which, even in its habitual condition and when excited by no provocation which would be liable to give undue control to passion in committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.”

Penal Law of New York, §§ 1044 and 1046.

“Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.” Revised Laws of Massachusetts, 1902, ch. 207, § 1.

The classification of murder into different degrees varies from state to state, but generally does not alter the common law qualities of the crime; see People v. Haun, 44 Cal. 96; State v. Lessing, 16 Minn. 75; Weighorst v. State, 7 Md. 442; State v. Carr, 53 Vt. 37. In Louisiana and some other states, there are, as at common law, no degrees of murder. State v. Hogan, 117 La. 863, 42 So. 352. The first statute dividing murder in two degrees was the act of Pennsylvania, April 22, 1794.

¹⁴ Arguments of counsel, part of the opinion of Christianity, and the dissenting opinion of Manning are omitted.

ordinary men, is cruel, wanton, or malignant, reckless of human life, or regardless of social duty.

But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

To what extent the passions must be aroused and the dominion of reason disturbed to reduce the offense from murder to manslaughter, the cases are by no means agreed; and any rule which should embrace all the cases that have been decided in reference to this point, would come very near obliterating, if it did not entirely obliterate, all distinction between murder and manslaughter in such cases. We must therefore endeavor to discover the principle upon which the question is to be determined. It will not do to hold that reason should be entirely dethroned, or overpowered by passion so as to destroy intelligent volition. *State v. Hill*, 4 Dev. & B. 491; *Haile v. State*, 1 Swan. 248; *Young v. State*, 11 Humph. 200. Such a degree of mental disturbance would be equivalent to utter insanity, and if the result of adequate provocation, would render the perpetrator morally innocent. But the law regards manslaughter as a high grade of offense—as a felony. On principle, therefore, the extent to which the passions are required to be aroused and reason obscured must be considerably short of this, and never beyond that degree within which ordinary men have the power, and are, therefore, morally as well as legally bound to restrain their passions. It is only on the idea of a violation of this clear duty that the act can be held criminal. There are many cases to be found in the books in which this consideration, plain as it would seem to be in principle, appears to have been, in a great measure, overlooked, and a course of reasoning adopted which could only be justified on the supposition that the question was between murder and excusable homicide.

The principle involved in the question, and which I think clearly deducible from the majority of well considered cases, would seem to suggest as the general true rule that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation or reflection and from passion, rather than judgment.

To the question, What shall be considered in law a reasonable or

adequate provocation for such state of mind, so as to give to a homicide, committed under its influence, the character of manslaughter? On principle, the answer, as a general rule, must be, anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them—not such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that physical effects follow from physical causes; for them the individual could hardly be held morally accountable. Nor, on the other hand, must the provocation, in every case, be held sufficient or reasonable, because such a state of excitement has followed from it; for then, by habitual and long continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men, and on account of the very wickedness of heart which, in itself, constitutes an aggravation both in morals and in law.

In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard—unless, indeed, the person whose guilt is in question be shown not to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition.

It is doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule the court, after informing the jury to what extent the passions must be aroused and reason obscured to render the homicide manslaughter, should inform them that the provocation must be one the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find such provocation from the facts proved, and should further find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter. Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of

life give him much less experience of the workings of passion in the actual conflicts of life.

The judge, it is true, must to some extent assume to decide upon the sufficiency of the alleged provocation, when the question arises upon the admission of testimony; and when it is so clear as to admit of no reasonable doubt upon any theory, that the alleged provocation could not have had any tendency to produce such state of mind, in ordinary men, he may properly exclude the evidence; but, if the alleged provocation be such as to admit of any reasonable doubt, whether it might not have had such tendency, it is much safer, I think, and more in accordance with principle, to let the evidence go to the jury under the proper instructions. As already intimated, the question of the reasonableness or adequacy of the provocation must depend upon the facts of each particular case. That can, with no propriety, be called a rule (or a question) of law which must vary with, and depend upon the almost infinite variety of facts presented by the various cases as they arise. See Stark. on Ev., Amer. ed. 1860, pp. 676 to 680. The law can not with justice assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances; and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents.

The same principles which govern as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or, in other words, to the question of cooling time. This, like the provocation itself, must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact, whether the injury inflicted by the provocation is more or less permanent or irreparable. The passion excited by a blow received in a sudden quarrel, though perhaps equally violent for the moment, would be likely much sooner to subside than if aroused by a rape committed upon a sister or a daughter, or the discovery of an adulterous intercourse with a wife; and no two cases of the latter kind would be likely to be identical in all their circumstances of provocation. No precise time, therefore, in hours or minutes, can be laid down by the court, as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very prin-

ciple on which provocation and passion are allowed to be shown at all in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and can not without gross injustice define the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the facts being found by the jury, is one of law for the court; but in all other cases it is a question of fact for the jury; and the court can not take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury. Stark. Ev., ed. of 1860, pp. 768, 769, 774, 775, In *Rex v. Hayward*, 6 C. & P. 157, and *Rex v. Lynch*, 5 C. & P. 324, this question of reasonable cooling time was expressly held to be a question of fact for the jury. And see Wharton Criminal Law, 4th ed., § 990, and cases cited. I am aware there are many cases in which it has been held a question of law; but I can see no principle on which such a rule can rest. The court should, I think, define to the jury principles upon which the question is to be decided, and leave them to determine whether the time was reasonable under all the circumstances of the particular case. I do not mean to say that the time may not be so great as to enable the court to determine that it is sufficient for the passion to have cooled, or so to instruct the jury, without error; but the case should be very clear. And in cases of applications for a new trial, depending upon the discretion of the court, the question may very properly be considered by the court.

It remains only to apply these principles to the present case. The proposed evidence, in connection with what had already been given, would have tended strongly to show the commission of adultery by Hunt with the prisoner's wife, within half an hour before the assault; that the prisoner saw them going to the woods together, under circumstances calculated strongly to impress upon his mind the belief of the adulterous purpose; that he followed after them to the woods; that Hunt and the prisoner's wife were, not long after, seen coming from the woods, and that the prisoner followed them, and went in hot pursuit after Hunt to the saloon, and was informed by a friend on the way that they had committed adultery the day before in the woods. I can not resist the conviction that this would have been sufficient evidence of provocation to go to the jury, and from which, when taken in connection with the excitement and "great perspiration" exhibited on entering the saloon, the hasty manner in which he approached and fired the pistol at Hunt, it would have been competent for the jury to find that the act was committed in consequence of the passion excited by the provocation, and in a state of mind which, within the principle already explained,

would have given to the homicide, had death ensued, the character of manslaughter only. In holding otherwise the court below was doubtless guided by those cases in which courts have arbitrarily assumed to take the question from the jury, and to decide upon the facts or some particular fact of the case, whether a sufficient provocation had been shown, and what was a reasonable time for cooling. * * *

The judgment should be reversed, and a new trial granted.

Martin, C. J., and Campbell, J., concurred.

Manning, J., filed a dissenting opinion.

COMMONWEALTH v. PAESE.

1908. SUPREME COURT OF PENNSYLVANIA. 220 Pa. St. 371,
69 Atl. 891, 123 Am. St. 699.

Indictment for murder. Before Capp, J.

The facts are stated in the opinion of the Supreme Court.

Opinion by MR. CHIEF JUSTICE MITCHELL, March 2, 1908.¹⁵

Briefly stated the substance of the case was that three Italians, who had been drinking (but to what extent they were affected by it became a question for the jury) got into an altercation about fares with the conductor and motorman of a car; a fight ensued between one of them, not the appellant, and the motorman, in which the latter, alleged to be much the larger and heavier man, beat the other severely. He then started back to his post at the front of the car when the appellant drew a revolver and fired five shots, stepping forward as he fired each shot. Appellant was tried and convicted of murder of the first degree.

The first assignment of error is that the court refused to affirm the following point: "If the jury believe that the deceased had just made an attack and committed a violent assault and battery upon George Paese, who was much the inferior of the deceased in size and weight, and that this was done in the presence of the defendant, who was the friend and companion of George Paese, and they also find that this attack so excited the passion of the defendant as to destroy all self-control, and that in this condition of ungovernable rage and without sufficient cooling time he shot and killed the person so attacking, the grade of the homicide is clearly but manslaughter."

Before taking up the exact question raised by this point it may be well to dispose of two smaller matters that were claimed at the argument to be in the case. It was claimed that the deceased

¹⁵ Part of the opinion is omitted.

kicked the appellant in the stomach as he passed him just before the shooting. The jury found there was no such kicking. It was further claimed that the disparity in size and apparent strength of the two men in the fight might make the appellant justly apprehensive for the life or grievous injury of his friend and he might, therefore, intervene to prevent a felony. But the evidence is practically undisputed that the fight was over and the deceased was retiring from the scene when the appellant drew his revolver.

The single question, therefore, remains whether conceding the beating to have been such as if inflicted upon the appellant himself would have permitted the jury to reduce the killing to manslaughter, it can have that effect when made upon another merely a friend.

To reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion, without time to cool,¹⁶

¹⁶ "The testimony does not show it, but it was stated by counsel for the petitioner in presenting this case, that the deceased, some nine or ten months previously, had shot and killed the son of the petitioner, and that the deceased had been tried for the offense and had been acquitted; and it is urged here that when the petitioner saw the deceased on this occasion, the recollection of that event must have engendered in him a passion which overcame him; that the killing was committed in the heat of such passion, was without premeditation, and therefore not murder. To this we can not assent, even if we could take the statement of counsel as a proper substitute for testimony tending to prove the facts stated. In *Ragland v. State*, 125 Ala. 12, 27 So. 983, four hours intervening between the provocation and the killing was held as a matter of law to be sufficient cooling time to preclude the reduction of a homicide to manslaughter. *Perry v. State*, 102 Ga. 365, 30 S. E. 903, and *Rockmore v. State*, 93 Ga. 123, 19 S. E. 32, each hold three days as a matter of law sufficient cooling time. *Commonwealth v. Aiello*, 180 Pa. St. 597, 36 Atl. 1079, holds from one to two hours sufficient, and *State v. Williams*, 141 N. Car. 827, 53 S. E. 823, holds fifteen minutes sufficient. And the authorities are all agreed that the question is not alone whether the defendant's passion in fact cooled, but also was there sufficient time in which the passion of a reasonable man would cool. If in fact the defendant's passion did cool, which may be shown by circumstances, such as the transaction of other business in the meantime, rational conversation upon other subjects, evidence of preparation for the killing, etc., then the length of time intervening is immaterial. But if in fact it did not cool, yet if such time intervened between the provocation and the killing that the passion of the average man would have cooled, and his reason have resumed its sway, then still there is no reduction of the homicide to manslaughter. (Authorities cited.) * * * If the fatal wound be inflicted immediately following a sufficient provocation given, then the question as to whether the defendant's passion thereby aroused had in fact cooled, or as to whether or not such time had elapsed that the passion of a reasonable man would have cooled, is a question of fact to be determined upon a consideration of all facts and circumstances in evidence; but when an unreasonable period of time has elapsed between the provocation and the killing, then the court is authorized to say as a matter of law that the cooling time was sufficient.

"Ordinarily one day, or even half a day is in law much more than a

placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting—if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder. *Commonwealth v. Drum*, 58 Pa. 9 (17).

What is sufficient provocation for this purpose has not been exactly defined, and is probably incapable of exact definition, for it must vary with the myriad shifting circumstances of men's temper and quarrels. It is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility, and, therefore, to be considered in view of all the circumstances. It is usually said that the sufficiency of the provocation is for the court. And such is the general rule, but it must not be taken too broadly, but applied to cases where the facts are undisputed or clearly established. * * * In the present case there being no disputed facts, the appellant's own point stating them as he claimed them to be, the learned judge was right in ruling upon them as a matter of law.

The next question is whether his ruling was correct. Though the sufficiency of the provocation has not been exactly defined, there are some points in regard to it which are well settled. Thus, no words nor mere gestures, however, false, foul or insulting, will free a party killing from the guilt of murder.¹⁷ *Russell* 714. Nor will

sufficient time for one's passion to cool; and a killing committed upon a provocation given some nine or ten months before is not, on account of that provocation or any passion engendered thereby, reduced to manslaughter. A deliberate killing committed in revenge for an injury inflicted in the past, however near or remote, is murder." *Richardson, J.*, in *In re Fraley*, 3 Okla. Cr. 719, 109 Pac. 295, 139 Am. St. 988. To same effect, see *State v. Towers*, 106 Minn. 105, 118 N. W. 361.

¹⁷ "So it will be seen that there are circumstances where words do amount to a provocation in law, i. e., a reasonable provocation to be submitted to the determination of the jury, and if found by them to exist, then the crime is lowered to the grade of manslaughter. If there ever was a case to which this principle should be applied, it would seem it should be applied to the case at bar. A father is informed that his young daughter just budding into womanhood has been ravished by his son-in-law, while under the supposed protection of his roof. Arriving where the son-in-law is, and making inquiry of him why he had done the foul deed, that father receives the answer, 'I'll do as I damn please about it.' This insolent and defiant reply amounted to an affirmation of Hadley's guilt. So long as human nature remains as God made it, such audacious and atrocious avowals will be met as met by defendant. It should be held, therefore, that the words in question should have been left to the jury to say whether, in the circumstances detailed in evidence, they constituted a reasonable provocation, and it so found that the defendant was guilty of no higher offense than manslaughter in the fourth degree." *Sherwood, J.*, in *State v. Grugin*, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. 553. See also, *Wilson v. People*, 4 Park. Cr. (N. Y.) 619, and *Reg. v. Rothwell*, 12 Cox C. C. 145.

slight or trivial injuries, though they amount in law to an assault, nor in all cases even a blow. Russell 715. Chief Justice Agnew, in *Commonwealth v. Drum*, 58 Pa. 9 (17), classes the two offenses together, and says: "Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a light and trivial kind." But in the case before him the alleged provocation was the threat of serious injury and the weapon used in the killing was a knife, and in the sentence quoted he was not dealing with details which the case did not call for, but merely rounding out for the information of the jury his general discussion of the subject. He certainly did not mean to depart from the accepted law, which is thus stated by Foster: "Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive of contempt or reproach, without an assault upon the person.

"This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unluckily and against his intention killed, it had been but manslaughter.

"The differences between the cases are plainly this: In the former the *malitia*, the wicked, vindictive disposition already mentioned, evidently appeareth; in the latter it is as evidently wanting; the party in the first transport of his passion intended to chastise for a piece of insolence which few spirits can bear. In this case the benignity of the law interposeth in favor of human frailty; in the other its justice regardeth and punisheth the apparent malignity of the heart." Foster, *Crown Law*, ch. 5, of Homicide.

On the other hand, certain circumstances have been held to be sufficient provocation. Thus, in general serious injury immediately inflicted or threatened, to wife (or husband), child or servant will, on account of the relationship of the parties, reduce the killing to manslaughter in similar cases as if the injury had been to self. The appellant claims that the same rule should be held in the case of a more distant relation, and even of a friend or companion, and his counsel have presented a brief of unusual learning and diligence on this point. The fullest discussion to be found is in *Pennsylvania v. Bell*, Add. 156, tried in 1793, where Judge Addison, after the manner of the time, delivered an elaborate charge, discussing the law in detail and referring to cases. In the course of it he says: "An attack on the person and safety of a friend is a provocation sufficient to extenuate to manslaughter a sudden killing in the peril and defense of this friend." This was said *obiter*, as there was nothing in the case to which it could apply, but the same

view has been stated from time to time by writers of considerable standing. Three cases are constantly cited and reiterated as authority for the doctrine, the Case of Manslaughter, 12 Coke 87; Huggett's Case, Hale, Pleas of the Crown 465; s. c. Kel. 59, and The Queen v. Tooley, 2 Ld. Raymond 1296. Critically examined, they afford the doctrine very doubtful support. The Case of Manslaughter, 12 Coke 87, is reported in six lines thus: "Divers men playing at bowls, two of them fell out and quarreled, the one with another, and the third man who had not any quarrel, in revenge of his friend struck the other with a bowl of which blow he died; this was held manslaughter for this, that it happened upon a sudden motion in revenge of his friend." The absence of report as to the circumstances and extent of the quarrel, the fact that the fatal blow was struck with an instrument not usually classed as a deadly weapon, etc., make this case of uncertain applicability, and yet it is perhaps the strongest authority for the point it appears to decide.

Huggett's Case is still more uncertain as to the facts. Hale says a press master with an assistant undertook to press a man for the army, and, a stranger interfering, a quarrel took place in which the stranger killed the assistant, and it was held manslaughter only. Kelyng in a fuller report, apparently based on the record of a special verdict, says the assumed press master and his assistant acted without warrant, and on the stranger interfering and requiring to see the warrant they were shown a paper which they declared to be no warrant, and drew their swords and a fight ensued, in which the pretended press master was killed. The judges divided, eight against four, holding it to be manslaughter only.

The Queen v. Tooley, 2 Ld. Raymond 1296 was an arrest of a woman on suspicion of a misdemeanor by a constable not in his own parish and without a warrant. The prisoners assaulted the constable for the purpose of rescue, but on being shown his staff desisted, and the woman was taken to the roundhouse. Shortly after the prisoners again drew their swords and assaulted the constable, and on one Dent coming to his aid, one of the prisoners killed Dent. It was held by seven judges against five that it was manslaughter only.

Both Huggett's and Tooley's case involved the elements of personal liberty in the right to resist an illegal arrest, and are discussed by Russell and by Wharton under that head. Russell on Crimes, Book III, § 3, p. 732; Wharton on Homicide, ch 8, § 295. Both were decided by a divided court, and are severely commented on by Foster, who says they have "carried the law in favor of private persons officiously interposing farther than sound reason founded in the principles of true policy will warrant," and "the doctrine advanced utterly inconsistent with the known rules of law touching a sudden provocation in the case of homicide." Crown

Law, Homicide, § 10 *et seq.* Mr. Wharton says: "By this high authority Tooley's case was greatly shaken, and it may now be considered as entirely overruled." Homicide, § 296. And that it had been overruled was flatly said by Alderson, J., in *Rex v. Warner*, 1 Moody's C. C. 380, and by Pollock, C. B., in *Reg. v. Davis, Leigh and Cave's C. C. 64*.

On this very insufficient foundation the commentators have gone on reiterating the same doctrine, but the most diligent search through Hale, Hawkins, East, Plowden, Russell and Wharton fails to discover any real adjudication to support it, or any other decision than the three already discussed that can be said to really bear upon it.

The American reports furnish but one additional case, and that so clearly against all the precedents as to be of no authority. *Moore v. State*, 26 Texas App. 322, was a case of an affray at a saloon with some drunken negroes. Deceased, one of the negroes, got into an altercation and when one apparently his friend attempted to persuade him to go home he went out to his horse and got his gun, warning the others not to approach. While sitting on his horse with the gun lying across his lap, one McAdoo attempted to take the gun and in the struggle it was discharged and McAdoo killed. The others then fired on deceased and killed him. This was held to be manslaughter, but as the deceased was acting on the defensive and in no way the aggressor at the time the gun was discharged, this ruling can not be sustained even under the old English authorities, unless the affray be held to have continued as one transaction until the killing of deceased, a view that the report perhaps permits but does not clearly sustain.

In *State v. Gut*, 13 Minn. 341, the defendant, indicted as one of a lynching party who killed an Indian while in jail, sought to justify on the ground that the Indian had killed his friend, but was held guilty of murder, the court saying: "Had the defendant been present when his friend was killed and under the excitement of the moment and in the heat of passion taken the life of the slayer it might perhaps be different."

In *Reese v. State*, 90 Ala. 624, the defense was that the deceased had killed the defendant's cousin an hour before, but the court said that "did not tend in the slightest degree to mitigate the offense" and a verdict of murder in the first degree was sustained.

These are all the additional cases that the editors of the *Am. & Eng. Ency. of Law* (Vol. 21 [2d ed.] p. 126,) have been able to present.

Courts do not sanction the increase of excuses for taking life, already too numerous, except under compulsion of weighty authority. Such authority has not been found in favor of the doctrine that a mere bystander may interfere to the extent of killing with

a deadly weapon in a stranger's quarrel, without being guilty of more than manslaughter. On the contrary, the fact that the annual thousands of homicides in the United States have produced no case in its favor is strongly persuasive that the doctrine beyond the recognized cases of husband and wife, parent and child or master and servant has no proper place in American jurisprudence. For the protection of the weak and unfortunate and the assertion of the duties of humanity reliance must be had on the ancient and settled right to interfere to prevent a felony, with its well guarded limitations that the injury to be prevented must be serious, must be imminent and not past, the quarrel in actual progress, and the necessity for the use of a deadly weapon clear of doubt. *Hale, Pleas of the Crown*, 484; *Kilpatrick v. Commonwealth*, 31 Pa. 198. Cases of killing without the use of a deadly weapon and apparently lacking the element of presumed intent to kill will be governed by the passage from *Foster* already cited.

The second assignment of error is to the portion of the charge defining manslaughter, in which it was said, "Voluntary manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessness of consequences or cruelty. Being sometimes a willful act as the term 'voluntary' denotes, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty." As stated by the learned judge below in refusing a new trial, "It is contended that the vice in this definition of voluntary manslaughter is contained in the statement that 'it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty,' and that this statement of the law puts too great a burden upon the defendant."

The portion of the charge is exactly in the language of *Agnew, J.*, in *Commonwealth v. Drum*, 58 Pa. 9. That charge, as is well known, was prepared by Judge Agnew with great care, and before delivery was submitted to the careful review of Chief Justice Thompson and other justices of this court. Though its language in places partakes of the sentimental style of the older books, it was based largely on *Russell on Crimes*, the most authoritative modern book on criminal law, and its substantial accuracy has never been challenged. On the contrary, it was intended as a precedent and guide in similar cases and as such has been frequently approved by this court. The very passage now complained of was quoted to the jury by *Sterrett, J.*, when presiding in the oyer and terminer of *Allegheny*, and was affirmed by this court. *Lynch v. Commonwealth*, 77 Pa. 205. It is too late now to subject it to mere verbal criticism.

The judgment is affirmed and the record remitted to the court below for the purpose of execution.

STATE v. LOCKWOOD.

1894. SUPREME COURT OF MISSOURI. 119 Mo. 463, 24 S. W. 1015.

BURGESS, J.¹⁸—At the September term, 1893, of the Circuit Court of Henry county an indictment was returned by the grand jury of said county against the defendant which, omitting the formal parts, is as follows:

"That Albert Lockwood, on the thirty-first day of July, 1892, at the county of Henry and state of Missouri, in and upon one Robert McAllister, then and there being feloniously, willfully and with culpable negligence, did make an assault and with a dangerous and deadly weapon, to wit, a pistol, then and there loaded with gunpowder and leaden balls, which he, the said Albert Lockwood, then and there in his right hand had and held at and against him, the said Robert McAllister, did then and there feloniously, willfully, and with culpable negligence, did shoot off and discharge, and with the pistol aforesaid, and the leaden balls aforesaid, then and there feloniously, willfully and with culpable negligence did shoot and strike him, the said Robert McAllister, in and upon the front part of the head and just above the left eye of him, the said Robert McAllister, giving him, the said Robert McAllister, then and there with the dangerous and deadly weapon, to wit, the pistol aforesaid, and the gunpowder and leaden balls aforesaid, in and upon the front part of the head, and just above the left eye of him, the said Robert McAllister, one mortal wound of the breadth of one inch and of the depth of four inches, of which said mortal wound the said Robert McAllister then and there on the said thirty-first day of July, 1892, at the county aforesaid, died, and so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Albert Lockwood him, the said Robert McAllister, in the manner and by the means aforesaid, willfully and with culpable negligence did kill and murder against the peace and dignity of the state."

At the May term, 1893, the defendant filed his motion to quash, which is as follows:

"Because it charges a willful or intentional killing and an involuntary killing in the same count. Because said indictment is evidently intended to be drawn for manslaughter in the fourth degree, and for an involuntary killing as a result of culpable negligence, and there could be no willful killing under said indictment.

"Because said indictment charges, or attempts to charge, both an intentional and an unintentional killing."

Which said motion was by the court sustained, to which action the state, by its prosecuting officer, duly excepted. After unsuccessful motion in arrest the state perfected its appeal.

¹⁸ Argument of counsel is omitted.

The insistence on the part of the state is that, although the indictment is for involuntary manslaughter, that the word willful where used in it is merely surplusage, and may be disregarded. Section 3477, under which the indictment was drawn, is as follows: "Every other killing of a human being by the act, procurement or culpable negligence of another, which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree."

Mr. Wharton, in his work on Homicide, § 5, says: "Manslaughter at common law is of two kinds: First. Voluntary manslaughter, which is the unlawful killing of another, without malice, on sudden quarrel or in heat of passion. Where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they, upon such occasion, go out and fight in a field; for this is one continued act of passion. So also if a man be greatly provoked by any gross indignity, and immediately kill his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendendo*. In these and such like cases, the law, kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt the cool, deliberate act and the result of hasty passion."

Section 6. "Involuntary manslaughter, according to the old writers, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed. Hence it is manslaughter where the death of another occurs through the defendant's negligent use of dangerous agencies; and so where death incidentally but unintentionally results in the execution of a trespass."

"Involuntary manslaughter is the accidental killing of a human being in the prosecution of some unlawful act not felonious, or in the improper performance of some lawful act (State v. Benham, 23 Iowa 154; State v. Zellers, 2 Halst. 220; 4 Black. Com. 192; 1 East P. C. 255); as where an act not strictly unlawful is done in an unlawful manner, and without due caution (Lee v. State, 1 Coldw. 62); * * * or killing accidentally in the unlawful and negligent use of fire-arms, without mischievous intent." Desty's Am. Crim. Law 128c; State v. Emry, 78 Mo. 77.

The question under consideration is not as to whether the defendant might not be convicted of involuntary manslaughter under § 3477, *supra*, under a proper indictment for manslaughter, or other homicide of higher degree, for such is the well settled law of this state, but is as to the sufficiency of the indictment in this case. If the killing was "willful," as charged in the indictment, then it

could not have been accidental, or by "culpable negligence." The terms are inconsistent, as they can not both be true. If the killing was by "culpable negligence" then it was not "intentional." The word "willful" has as much significance as do the words "culpable negligence" and we have the same right to say the latter are mere surplusage as we have the right to say the word "willful" is.

The indictment we think insufficient in law, and the court did not err in sustaining the motion to quash it. Judgment affirmed. All of this division concur.¹⁹

¹⁹ "Under the various statutes dividing manslaughter into degrees, involuntary manslaughter remains substantially unchanged, their only effect, generally speaking, being to label it manslaughter in some particular degree, instead of involuntary manslaughter." Wharton on Homicide (3d ed.), § 210.

CHAPTER XII.

CRIMES AGAINST PROPERTY.

Section 1.—Larceny.

(A) PROPERTY SUBJECT TO LARCENY.

"What are such goods, the stealing whereof may amount to felony, the following particulars are to be observed:

"They ought to be no way annexed to the freehold, and therefore it is no larceny, but a bare trespass, to steal corn, or grass, growing, or apples on a tree, or lead on a church, or house, but it is larceny to take them, being severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time and then come again at another time and take them away. * * *

"They ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which can not be stolen, as paper or parchment on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt, or other chose in action; and the reason wherefore there can be no felony in taking away any such thing seems to be because, generally speaking, they being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price, and everybody's money; and for the like reason it is no felony to take away a villain, or an infant in ward.

"They ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever, they may be valued by the owner, shall never be so highly regarded by the law that for their sakes a man shall die, as he may for stealing a hawk, known by him to be reclaimed, not only by force of the Statute of 37 Ed. 3, 19, but also at common law, in respect of that very high value which was formerly set upon that bird." 1 Hawkins P. C., ch. 33, §§ 20-23.

PEOPLE v. GRIFFIN.

1869. KINGS COUNTY COURT OF SESSIONS.
38 How Pr. (N. Y.) 475.

Motion by defendant to set aside conviction for grand larceny.

TROY, J.¹—The prisoner was convicted of grand larceny at the last term of this court, in feloniously stealing a tin box of the value of five dollars, and certain papers described as instruments in writing, consisting of three several receipts for money, and three certificates of stock in incorporated companies. Each receipt was for more than twenty-five dollars, and each certificate was for a number of shares, purporting to be of the value of more than twenty-five dollars. Upon the trial, no evidence was offered as to the value of those documents, for the reason, as was claimed by the prosecution, that the statute fixed such value, and the court so held for the purposes of the trial, reserving, however, the final determination of the question for subsequent consideration. It was contended by the defendant's counsel that the receipts were not personal property within the meaning of the statute, and that consequently larceny could not be committed thereof, and this point was disposed of in the same manner. The prisoner now moves to set aside the conviction, and in deciding the motion, I shall examine the questions in the inverse order.

Larceny at common law could only be committed of goods which had some worth in themselves, and did not derive their value merely from their relation to some other thing, hence written instruments were not the subject of larceny whether they related to real estate or concerned mere choses in action. If they related to real estate the taking was merely trespass, for the reason that such instruments were supposed to savor of the realty and were considered a part thereof, descendible with it to the heir; and if they were mere choses in action, as bonds, bills or notes, they were held not to be goods whereof larceny could be committed, being of no intrinsic value and not importing any property in the possession of the person from whom they were taken.² (1st Hawkins' Pleas of the Crown, ch. 32, § 35; 4 Black. Com. 234; 2d East Pleas of the Crown, ch. 16, § 35, p. 597; 2d Russell on Crimes 69, and Sergeant

¹ Part of the opinion is omitted.

² Accord: *State v. Dill*, 75 N. Car. 257; *Damewood v. State*, 1 How. (Miss.) 262; *Culp v. State*, 1 Port. (Ala.) 33, 26 Am. Dec. 357; *United States v. Davis*, 25 Fed. Cas. No. 14930, 5 Mason (U. S.) 356; *Reg. v. Powell*, 5 Cox Cr. C. 396; but by statute various choses in action have become subject to larceny, such as bank notes, promissory notes, bills of exchange, checks, certificates of deposit, warehouse receipts, etc. See Penal Law of N. Y., § 1290, and statutes of the various states defining larceny.

Hawkins says the reason why a felony could not be committed of such things was that "being of no use but to the owner, they are not supposed to be so much in danger of being stolen, and therefore need not be provided for in so strict a manner as those things which are of a known price and everybody's money." (The King agt. Webster, 1 Leach Cr. C. 16; 1 Hawkins P. C. 142.) Various laws were passed from time to time in England for the protection of this kind of property, all of which were consolidated by the 7th and 8th Geo., 4 C. 27, 85, and those acts made the stealing of every species of valuable written security a felony of the same nature and degree and punishable in the same manner as the stealing of any chattels of like value. The law also fixed the value of such property, but no instrument in the nature of a common receipt or acknowledgment for money paid in full, or partial discharge of an indebtedness is enumerated or included within the general language of the acts; and it is clear from the careful phraseology employed that it was not the intention to protect documents, the obstruction of which from the possessor could neither injure him nor benefit the thief.

The same principle seems to have guided the framers of our statute upon this subject, which declares after defining the crimes of grand and petit larceny: "Grand larceny being the felonious taking and carrying away the personal property of another of the value of more than twenty-five dollars; and petit larceny the stealing, taking away and carrying away the personal property of another of the value of twenty-five dollars, or under; that "the term personal property as used in this act shall be construed to mean goods, chattels, effects, evidence of right in action, and all written instruments by which any pecuniary obligation or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, discharged or diminished." (2d Rev. Stat. 726, § 33.) This statute has reference very clearly to instruments which, as such merely, have the legal effect and operation contemplated thereby. The instrument of itself alone must create, acknowledge, transfer, increase, defeat, discharge, or diminish a pecuniary obligation or a right or title to property, real or personal.

Now common receipts, such as are described in the indictment, can not be properly called instruments at all, for such documents have no legal effect as instruments whatever, they are at most but acknowledgments in writing of full or partial payments and may be used in evidence to prove such payment. But they can not be pleaded, and when proved may be explained or contradicted; they are mere written admissions and can only be treated as such. Not so with releases, either general or special; those are instruments having a recognized legal force and effect; they may be pleaded and when proved can only be impeached for fraud or want of con-

sideration, and any legal consideration is sufficient to support them. There is a broad distinction between legal instruments which are acts and mere written admissions which are only evidence. And this is the difference between a common receipt and such an instrument as is contemplated by the statute. This question was passed upon in the case of *People v. Bradley*, 4 Parker's Criminal Reports, p. 245, and the principles there laid down are entirely in accordance with the law as I understand it, and the distinction is noted between common receipts and accountable receipts, warehouse receipts and others of such nature. Receipts of this latter description are undoubtedly the subject of larceny, but I am satisfied that common receipts were not intended to be and are not embraced within the provisions of the statute. It is unnecessary in examining this part of the case to refer to the section regulating and declaring the value of said instruments as within the statute, inasmuch as it can have no application whatever to a writing not within the act. I shall call attention to its provisions, however, hereafter in connection with the remaining questions in the case.

It is contended that the certificates of stock are not within the statutory definition of personal property, but that if they should be so considered, then it is claimed that the law affixes no value to them, and none having been proved, the conviction must be reversed.

The certificates, it is true, do not create, transfer, increase, defeat, discharge or diminish any pecuniary obligation or any right or title to property, real or personal. They "acknowledged," however, the right and title of the holder to a certain number of shares of stock in the several corporations by which they were issued, and are evidences of such right and title. This, in my judgment, brings them within the protection of the statute defining the term "personal property." * * *

COMMONWEALTH v. SHAW.

1862. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
4 Allen (Mass.) 308, 81 Am. Dec. 706.

Indictment for larceny of several hundred "cubic feet of illuminating gas, each cubic foot being of the value of three mills, of the property, goods and chattels of the Boston Gas Light Company."

BIGELOW, C. J.³—We can not doubt that the instructions given to the jury in this case were right. There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article

³ Statement of facts, and part of the opinion are omitted.

of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place. In the present case it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes, which belonged to them, and that the defendant severed a portion of that which was in a pipe of the company by taking it into her house and there consuming it. All this, being proved to have been done by her secretly, and with an intent to deprive the company of their property, and to appropriate it to her own use, clearly constituted the crime of larceny. * * *

Exceptions overruled.⁴

STATE v. BERRYMAN.

1873. SUPREME COURT OF NEVADA. 8 Nev. 262.

By the court, HAWLEY, J.⁵:

Appellant having been convicted of grand larceny, moved to arrest the judgment upon the ground that the indictment did not state facts sufficient to constitute a public offense. The court refused the motion and appellant thereupon appeals from the judgment.

The indictment charges "that said defendants, Joseph Oxford and James Berryman, on the thirtieth day of July, A. D. 1872, * * * at the county of Lander, in the state of Nevada, * * * six hundred and ten pounds of silver-bearing ore, of the value of eight hundred dollars, of the property of the Manhattan Silver Mining Company of Nevada, a corporation duly organized and existing, * * * did feloniously * * * steal, take, and carry away. * * *"

It is claimed that the property alleged to have been stolen savors of the realty, and that there is no sufficient statement of facts in the indictment showing it to be personal property. The rule that things savoring of the realty are not the subject of larceny is stated by Sir Mathew Hale as follows: "If a man cut and carry away corn at the same time it is trespass only, and not felony, because it is but one act; but if he cut it and lay it by and carry it away afterwards it is felony." *Emmerson v. Annison*, 1 Mod. 89. The reasons given by Blackstone (Vol. 4, p. 232) for this distinction is that "Lands, tenements and hereditaments (either corporeal or in-

⁴ Accord: *State v. Wellman*, 34 Minn. 221, 25 N. W. 395; *Reg. v. White*, 6 Cox Cr. C. 213. See also, *Ferens v. O'Brien*, 15 Cox Cr. C. 332 (water of a company in the pipes).

⁵ Statement of facts, arguments of counsel, and part of the opinion are omitted.

corporeal) can not, in their nature, be taken and carried away. And of things, likewise, that adhere to the freehold, as corn, grass, trees and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate and, therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since that very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at another time when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner or any one else has severed them."

The rule containing this subtle and unsatisfactory distinction is sustained by all the authorities. 2 Bishop on Cr. L., §§ 779, 780, 781, 782, and authorities there cited. There is some conflict in the authorities as to what interval of time must elapse between the acts of severance and asportation. The doctrine seems now to be settled, as laid down in Bishop, that no particular space is necessary, only the two acts must be so separated by time as not to constitute one transaction.

There is no substantial reason why the thief who, with felonious intent, takes and carries away apples from a tree, lead pipe from a building, or quartz rock containing precious metals from a mine, etc., at one time, should not be punished the same as the thief who first severs the things from the freehold and afterwards goes back and carries them away. It is the criminal intention that constitutes the offense, and this intention is the only criterion by which to distinguish a larceny from a trespass. In our judgment the more sensible rule would be that as soon as the things which savor of realty are severed from the freehold, they become *eo instante* the personal property of the owner, the felonious taking and carrying away of which would constitute larceny.

So far as the present case is concerned it is unnecessary to depart from the beaten path of precedent which the authorities have

(as we think without substantial reason) established. In *The People v. Williams*, 35 Cal. 673, cited and relied upon by appellant, the indictment was for taking and carrying away "from the mining claim of the Brush Creek Gold and Silver Mining Company * * * fifty-two pounds of gold-bearing quartz rock." The court said that the indictment was "entirely silent as to whether the rock was a part of a ledge and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterwards removed it." The court said that the indictment was therefore capable of a double interpretation and for this uncertainty it was set aside. Larceny is the felonious taking and carrying away the personal goods or chattels of another, and if the facts stated in the indictment do not show that the ore was personal property at the time of the commission of the offense, the indictment can not be sustained. The character of the property, whether real or personal, must be determined by the statement of facts set out in the indictment. Section 241 of the Criminal Practice Act provides that "the words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning." The word ore is not defined by law, and must therefore be construed in its usual acceptance. The words "silver bearing ore," as used in the indictment, have reference to a portion of vein matter which has been extracted from a lode and assorted, separated from the mass of waste rock and earth and thrown aside for milling or smelting purposes, or taken away from the ledge. Webster gives the following definition: "Ore (mining). The ore of a metal with the stone in which it occurs, after it has been picked over to throw out what is quite worthless." In our judgment, the language used in the indictment necessarily implies that the ore had been severed from the freehold prior to the time of its asportation by Oxford and Berryman. We think that the act charged is stated with sufficient certainty to enable the court to pronounce judgment according to the right of the case, and that is all the statute, in this respect, requires. Crim. Prac. Act 461, § 243.

From the testimony elicited at the trial, it appears that Oxford and appellant, while engaged at work upon the Black Ledge owned by the corporation, had (in small quantities and at different times) feloniously carried away therefrom the "six hundred and ten pounds of silver bearing ore." The question whether the acts of severance and of asportation were so separated by time as not to constitute one transaction was, under proper instructions, fairly submitted to the jury. * * *

The judgment of the district court is affirmed.⁶

⁶ Realty and things attached to real estate are not the subject of larceny at common law, unless severed and taken away in two distinct

(B) FROM AND BY WHOM PROPERTY MAY BE STOLEN.

"If A bail goods to B to keep for him, or to carry for him, and B be robbed of them, the felon may be indicted for larceny of the goods of A or B and it is good either way, for the property is still in A, yet B hath the possession, and is chargeable to A if the goods be stolen, and hath the property against all the world but A. * * * Regularly a man can not commit felony of the goods wherein he hath a property. * * * Yet if A bails goods to B and afterwards *animo furandi* steals the goods from B with design probably to charge him for them in an action of detainue, this is felony." 1 Hale P. C., ch. 43, p. 513.

MOSELY v. STATE.

1875. SUPREME COURT OF TEXAS. 42 Tex. 78.

ROBERTS, CHIEF JUSTICE.—It was proved that Henry Garrison had in his possession and in his house a double barrel shotgun of the value of twenty dollars or over, which he had borrowed from Columbus Smith, to whom it belonged; that he, Garrison, had thus had the gun borrowed and in his possession for about twelve months, and that defendant had stolen the gun from him out of his house, whilst it was thus in his possession.

The indictment charged the defendant with the theft of the gun, "the property of one Henry Garrison." The only point in the case is whether or not the proof supported the charge in the indictment as to the ownership of the property stolen.

The court, after giving the usual charge in such a case of theft, also charged the jury that "if the evidence satisfies you that the gun belonged to Columbus Smith, and he had loaned it to said Henry Garrison for the year, and it was fraudulently taken and stolen from the possession of Henry Garrison by the defendant, as above charged, you will consider the said gun the property of said Henry Garrison at the time it was stolen."

transactions. *Bell v. State*, 4 Baxt. (Tenn.) 426; *Beall v. State*, 68 Ga. 820; *State v. Prince*, 42 La. Ann. 817, 8 So. 591; *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5. For cases involving fixtures, see *Ex parte Willke*, 34 Tex. 155 (doors); *Junod v. State*, 73 Nebr. 208, 102 N. W. 462, 119 Am. St. 890 (wire fastened to posts); *Langston v. State*, 96 Ala. 44, 11 So. 334 (valves on boiler, and pump on skids not imbedded in ground); *Jackson v. State*, 11 Ohio St. 104 (leather belt connecting wheels in a mill). Title deeds were not subject to larceny at common law; *Reg. v. Westbeer*, 1 Leach. 13; *Reg. v. Powell*, 5 Cox Cr. C. 396. Live animals *ferae naturae* were not subject to larceny unless enclosed, or restrained, but useful domestic animals were; see 25 Cyc., pp. 17 and 18.

The defendant's counsel asked the court to charge the jury that "if the proof satisfied them that the gun alleged to have been stolen was not the property of Henry Garrison, the party alleged to be the owner of the gun, you will find the defendant not guilty," which the court refused to give.

The alleged error in the charge of the court, and the refusal to give the charge asked, were the grounds set forth in the motion for new trial, after the jury had returned a verdict of guilty, which motion was overruled.

The charge of the court in effect instructed the jury what facts were necessary to give to Henry Garrison a special property in the gun, and having done so, he might well refuse to give the charge asked, which would only have tended to confuse the jury as it was presented.

It is well established that property may be alleged in an indictment to belong to one who has a special property in it at the time it is stolen. (*Langford v. The State*, 8 Tex. 116; 3 Greenl. Ev., § 161.)

*Affirmed.*⁷

BARNES v. PEOPLE.

1856. SUPREME COURT OF ILLINOIS, 18 Ill. 52,
65 Am. Dec. 699.

The plaintiff in error was convicted of horse stealing, at the Massac Circuit Court, at June term, 1855, Parish, Judge, presiding.

The third instruction asked by plaintiff in error was as follows: "If the jury should find, from the evidence, that the horse in question was the property of Dugald McInnis, the indictment would not be supported by proof of the horse being the property of Dougal McGinnis, unless the jury are satisfied, from the evidence, that the said Dugald McInnis was usually known as well by one name as the other."

The horse had been taken from the possession of William Shuts, an innkeeper, who had, at the time, a special property in the horse.

SCATES, C. J.—The plaintiff was indicted and convicted of steal-

⁷ One who has the legal possession of property may be alleged to be the owner in an indictment; see cases in 25 Cyc., pp. 89, 90, where the property was alleged to be in a common carrier, innkeeper, pledgee, hirer, cestui que trust, repairer, lienor, one in possession under a contract to buy, a constable holding goods taken on execution, etc. This principle has been carried so far that it has been held proper to allege ownership in one who has stolen goods, and from whom they have been feloniously taken by another thief. *Ward v. People*, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144; *People v. Nelson*, 56 Cal. 77.

ing the horse of Dougal McGinnis, though his real name was Dugald McInnis. It seems to us that any supposed variance is amply met and fully settled by the doctrine in relation to *idem sonans*. The names in ordinary enunciation, would be undistinguishable, and it would require particular distinctness in the enunciation of the letters to make a difference apparent. The court, we think, instructed properly as to the *idem sonans*, and that the party might also be as well known by the one name as the other. Whart. Am. Crim. L., 278; State v. France, 1 Tenn. R. 434; United States v. Hinman, 1 Baldw. 292; Rex v. Berriman, 5 Carr. & Payne 601; Rex v. —, 6 *id.* 408.

The court properly refused the third instruction asked by plaintiff in error, which would require the jury to find on the ground, alone, of prosecutor being as well known by one name as the other, omitting altogether the immateriality of the variance on account of the *idem sonans*.

The only remaining question is as to proof of general ownership of the horse by prosecutor.

The same general evidence of property is admissible and as sufficient in criminal as in civil cases. Possession, with general acts of ownership over the horse, such as riding to the hotel and putting up as a guest, are sufficient to warrant the verdict, where there is no evidence offered to rebut or contradict the right of property. No evidence of any other general owner is shown. The special property in the landlord, by bailment to him as innkeeper, might also support an allegation of property in him; but the existence of such special property in the innkeeper will by no means prevent the prosecution from alleging property in the general owner.

The cases referred to by plaintiff's counsel, of Commonwealth v. Morse, 14 Mass. 218, and State v. Furlong, 19 Maine 225, are not inconsistent with these views. In the first the court held that the bailment of the goods levied upon by the officer to another to keep and return did not confer such a special property in the bailee as would support an allegation of ownership in an indictment for larceny. This is questioned by the editor, and justly indeed, unless the bailment conferred no property at all upon the bailee. But we need not stop here to discuss this question, as there can be no doubt that an innkeeper would acquire a sufficient special property to support an allegation of ownership. Yet this will not exclude the general ownership; but it may be laid as the property of either. The proof of ownership in the case in Maine was wholly uncertain and insufficient.

Judgment affirmed.⁸

⁸ Accord: Holding that ownership may be alleged to be in either the general or special owner. State v. Gorham, 55 N. H. 152; Kennedy v. State, 31 Fla. 428, 12 So. 858; State v. Mullen, 30 Iowa 203.

HENRY v. STATE.

1900. SUPREME COURT OF GEORGIA. 110 Ga. 750, 36 S. E. 55, 78 Am. St. 137.

Accusation of larceny from the house.

LEWIS, J.—Sherman Henry was placed upon trial in the city court of Albany upon an accusation charging him with entering the dwelling house of one Tempie Mack with intent to steal, and with wrongfully, fraudulently, and privately taking and carrying away therefrom, with intent to steal the same, one suit of clothes and one bicycle of the value of \$15, the personal property of said Mack. To this accusation he pleaded not guilty. Briefly stated, the following is the substance of the testimony introduced on the trial: Tempie Mack, the prosecutrix, testified that the accused came to her to engage board. She replied to him that he would have to pay her in advance, as she had lost so much by boarders. Accused replied that he had a trunk full of clothes and a bicycle, and that he would deliver them to her as security for the board. This conversation took place during the day, and that night the accused came back to the home of prosecutrix, bringing with him his trunk and bicycle, and said, "Here is a suit of clothes that cost me \$8.00, and a bicycle, that I turn over to you as security for my board." She accordingly received these chattels, and had them placed in a room in her house occupied by her son. The accused also was assigned to this room, where he lodged as a boarder. He kept the key to his trunk, wore the clothes, and rode the bicycle occasionally. In the trunk was a new suit of clothes. He agreed to pay two dollars per week for board, and he remained in the house as a boarder a little over three weeks, for which he was due seven dollars. A demand was made on him for the money. He left the house, leaving the bicycle and trunk therein. Two or three days afterwards the landlady missed the bicycle. She then examined his trunk and found the new suit of clothes had also been taken away. It further appeared from the testimony that the accused had sold the bicycle and was wearing the new suit of clothes in another place, where he was engaged in work. The accused introduced no evidence, but made a statement, in which he admitted that he told the landlady his trunk and clothes would be responsible for his board, but denied delivering them to her, stating he kept the key to his trunk, wore his clothes, and rode his bicycle whenever he wished; said he did not intend to steal anything, but he put on the new suit of clothes to attend to a job in Arlington, where he was working when arrested, and simply desired to make some money so that he could pay his board. The judge of the city court, before whom the case

was tried without a jury, after hearing the evidence, found the accused guilty; whereupon he made a motion for a new trial, on the general grounds that the verdict was contrary to law and evidence. To the judgment of the court overruling this motion the accused excepts.

There can be no question about the soundness of the proposition that property stolen from a bailee may be charged in an indictment to be his property, and authorities have even gone to the extent of holding that property stolen from one who had himself stolen it could be alleged as his. It is equally true that property in the hands of a bailee may be stolen by the general owner. Clark, Cr. Law, pp. 246, 247; 18 Am. & Eng. Ency. Law, pp. 598, 599. In the case of *Wimbish v. State*, 89 Ga. 294, it was decided by this court that: "the ownership of personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when it was stolen, though the bailment was gratuitous." In *Davis v. State*, 76 Ga. 721, it appears that the accused was indicted for obstructing an officer in the execution of legal process. It seems that after a levy of a *fi. fa.* by the sheriff, the defendant in *fi. fa.* privately took and carried the property levied upon to an adjoining county. It was held by a majority of this court that this did not constitute the offense with which he was charged, and on page 722 Justice Blandford says: "In this case that which the plaintiffs in error did was not to oppose the officer, but it was to defeat the execution of the process by committing the crime of simple larceny. * * * The plaintiffs in error should have been indicted for simple larceny, and not for the offense for which they were indicted." From these principles it necessarily follows that when property has been delivered by the owner to one as a pledge to secure a debt, the pledgee has sufficient interest in the same to maintain a prosecution against any one, even the general owner, by charging that the property belonged to him, the pledgee. We do not understand, however, that this principle is denied. Counsel for plaintiff in error seek a reversal in this case upon the idea that the testimony does not show such a delivery of the property in question as would constitute a valid pledge in law. We think there is sufficient testimony for the judge to infer an actual delivery by the accused of this property as security for the payment of his board. The fact that he was permitted to use it does not deprive the pledgee in this case of the right to its custody and control. Nothing can be gathered from the evidence in the record to indicate that she ever consented to such a use or disposition of the same as to absolutely deprive her of such possession. A portion of the property pledged was actually sold to another party by the pledgor without her knowledge and consent; and the circumstances developed by the evidence touching the manner of its disposition by the pledgor

were amply sufficient for the judge to infer that he had a fraudulent purpose of depriving his creditor of this security. This identical question was made and passed upon by the Supreme Court of Iowa in the case of *Bruley v. Rose*, 57 Iowa 651. It was there decided: "A pledgee has a special property in the thing pledged, and a pledgor, who takes the property from the pledgee's possession with the felonious design of depriving such pledgee of his security, may be guilty of larceny." In that case it appeared that Bruley had been charged with larceny of a span of horses which he had bought from Rose. For these horses Bruley was indebted to Rose in the sum of \$45.60, and to secure the payment of this balance it was claimed that Bruley delivered the horses to Rose as a pledge, and afterwards gained possession of them under false pretenses, and with the felonious design of depriving him of his security. It appeared that Rose did give him permission to take the horses for a particular purpose. It was accordingly held that, if he took them for a fraudulent purpose, he was guilty of the offense of larceny. Applying these principles to the facts in this case, we think the court did right in overruling the motion for a new trial. Judgment affirmed. All concurring, except Fish, J., absent.⁹

STATE v. PARKER.

1882. CUYAHOGA COMMON PLEAS. 3 Ohio Dec. (Reprint) 551.

In the Cuyahoga County Common Pleas Criminal Court, Judge J. M. Jones delivered the opinion given below in the case of *The State v. Daniel Parker*, indicted for stealing money and jewelry from his wife, Mary Parker. The couple, though living separately, had not been divorced at the time the property was taken, and J. H. Rhodes, Esq., who was assigned by the court to defend the prisoner, made the point that the unity of the marriage relation is such that it is impossible for a husband to commit larceny of his wife's property or a wife of her husband's property. The decision in the case is one of unusual interest.

JONES, J.—The defendant in this case is under indictment in this court on the charge of grand larceny in stealing and converting to his own use in June last, money and jewelry to the value of about six hundred dollars, alleged to be the separate property

⁹ Accord: Holding that the true owner may be guilty of larceny in taking property in which another has a rightful interest derived from the owner. *Adams v. State*, 45 N. J. L. 448; *People v. Long*, 50 Mich. 249, 15 N. W. 105; *People v. Thompson*, 34 Cal. 671; *Palmer v. People*, 10 Wend. (N. Y.) 165, 25 Am. Dec. 551.

of one Mary Parker, who it is conceded was then and there the wife of said defendant, Daniel Parker, who was then living apart from him, and a suit for damages was then pending between them. It is unquestionably true that under the common law and in the absence of statutes providing for and regulating the separate estates of married women, that no indictment could have been maintained against either a husband or a wife for larceny or embezzlement of the goods and chattels belonging to the other. This doctrine was distinctly announced in England more than two hundred years ago, and has been consistently and uniformly maintained since then. Said Sir Mathew Hale, "The wife can not commit felony of the goods of her husband, for they are one person in law." Hale's Pleas of C. 514. In Hawkins' Pleas of Crown, ch. 32, § 33, the law is stated as follows: "It is certain that a *femme covert* may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's, because a husband and wife are considered as but one person in law, and the husband by endowing his wife at the marriage with all his earthly goods gives her a kind of interest in them." And in a comparatively recent English case it was held that a wife could not be convicted of a crime of receiving stolen goods from her husband; and all the five judges on appeal concurred in this principle and agreed in setting aside against her. 14 Eng. L. and Eq. 580.

This exemption of either from the crime of larceny in regard to the goods of the other has been chiefly placed on the ground of the legal unity of husband and wife by virtue of the marriage relation, and is distinctly sustained in numerous well approved authorities. See 2 Bishop on Cr. Law 855; 2 Bishop on Law of M. W. 152-3; 8 Cox C. C. 184; Leigh and C. 511; 48 Indiana 197; Wharton Cr. L., §1802; 6 Cowan 572; 1 Eng. L. and Eq. 542; 26 Eng. L. 570.

And upon this principle of legal unity of the husband and wife, so as to be but one person in law, the husband can not by any common-law conveyance give or grant any legal estate directly to the wife, either in possession, reversion or remainder, though such gifts may be upheld in equity. Tyler on Infancy and C., § 357; 1 Bishop on M. W., § 35; 16 O. S. 493; 14 Barber 531. The soundness of the doctrine laid down by some of the authorities, to wit: That one of the reasons why a wife can not commit larceny of the goods of her husband is because she has been endowed of his earthly goods may be questioned and has been questioned for the reason that marriage gives her no distinct title to her husband's goods, no control on them, no rights to their separate possession, no power over them except as his agent, and he might sell or dispose of them, or bequeath them, in any way he pleases.

But it is claimed that in the case at bar the law is wholly changed

or modified by reason of the statute of the state of Ohio creating, providing for and defining the separate estate of married women.

Section 3109 of the Revised Statutes of 1880 provides "that the personal property, including rights in action, belonging to a woman at her marriage, as coming to her during her coverture, by gift, bequest, or inheritance, or by purchase with her separate money or means, or due in the wages of her separate labor or growing out of any violation of her personal rights, shall, together with all income, increase and profit therefrom, be and remain her separate property and under her sole control and shall not be liable to be taken by any process of law for the debts of her husband."

It seems to me that while the ancient law in respect to the property relation of the husband and wife had by reason of this statute undergone a great and radical change, the marital relation in its essential nature and the doctrine of the legal unity of the parties by reason of that relation remains wholly undisturbed; the marital obligations of a party are the same, the promises of each are binding as before, the husband is still liable to support, protect and maintain his wife, she is entitled to dower in his estate, and he to curtesy in hers, he is still liable as before the statute to respond for any torts, such as assaults, slanders, libels, etc., which she may be guilty of; and no one would claim for a moment that the statute authorizing her to hold the wages of her separate labor would entitle her to charge her husband for her services in doing her household duties.

Chief Justice Lowry, of Pennsylvania, in discussing the effect of a similar statute of that state which declared that a woman's property shall continue hers "as fully after her marriage as before," and "shall be owned, used and enjoyed by her, as her own separate property," says "as the only object of the statute was to afford a protection to the estate of a married woman, we may assume that it was not intended that she should so fully own her separate property as to impair the intimacy and unity of the marriage relation: it was not intended to declare that her property should be separate, that her husband could be guilty of larceny or be liable in trespass or trover for breaking a dish or a chair or in using either without her consent. 12 Casey 410.

Judge Lawrence, of Illinois, in discussing a similar statute, says: "Supposing a house and furniture are owned by a wife as her separate property, can she forbid the husband the use of such portion of it as she may choose, allowing him to occupy only a particular chair or to take from the shelves of the library a book only on her permission? This would be all very absurd and we know the legislature had no idea of enacting a law to be thus interpreted." 44 Ill. 58.

And Mr. Wells in his valuable "Treatise on the Separate Property

of Women," page 104, says, after discussing the question in regard to various separate property statutes, "I suppose it may be safely assumed that the husband and wife are not so far rendered 'twain' by these statutes as to be capable of stealing from each other, whatever civil remedies are provided to protect their rights respectively as between themselves."

This doctrine is discussed and approved in the 2d vol. "Bishop's Law of Married Women," §§ 152-3-4. He says: "One point which seems to be admitted is that the husband can not commit larceny of the wife's separate statutory estate; also it was never known or dreamed of where the common law prevailed that a husband or wife could be sued in trespass for a wrong done to the personal or real estate of the other and the rules by which such consequential effects are given to statutes would not seem to require such an effect to follow the statutes under consideration."

In Illinois under a statute regarding the wife's separate property not materially different from ours it was decided "that the act has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Whatever is the civil liability it is not larceny." 51 Ill. 165.

This question also came into consideration but was not fully decided in the following cases: 43 Texas; 70 Ind. 317.

But I have not been able to find any case under any of the statutes relating to the separate estate of married women which holds distinctly that a husband may be guilty of larceny in regard thereto. And I can not perceive that the separate property of the wife is now essentially different from the estate the husband held before the enactment of these statutes, or now holds in regard to his own property, nor any good reason, if she could not be liable for larceny or embezzlement of his goods before the enactment of these statutes, why he can be held so liable in respect to her property since.

And in the case at bar I hold that it makes no difference in law that they were living separate and apart at the time of the transaction, the legal relation still existed with all its results, and whatever of moral turpitude was manifested in this case by defendant, the offense, to wit, stealing the goods of another, was not perpetrated and the indictment in this case can not be maintained.

The indictment was nolle and the defendant discharged.¹⁰

¹⁰ Contra, under "Separate Property Acts"; *Beasley v. State*, 138 Ind. 552, 38 N. E. 35, 46 Am. St. 418; *Hunt v. State*, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. 34. The wife's paramour who takes, or assists in taking the common property is guilty of larceny. *People v. Schuyler*, 6 Cow. (N. Y.) 572; *People v. Swalm*, 80 Cal. 46, 22 Pac. 67, 13 Am. St. 96.

A co-partner or co-owner can not (in the absence of a statute) commit larceny of the common property. *Jones v. State*, 76 Ala. 8; *Alfele v. Wright*, 17 Ohio St. 238, 93 Am. Dec. 615; *Kirksey v. Fike*, 29 Ala. 206.

(C) CAPTION AND ASPORTATION.

"Simple larceny is defined by Bracton and Britton to be *fraudulenta contrectatio rei aliene cum animo furandi invito domino cujus res illa fuerit*; by my lord Coke to be the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night, in the house of the owner. Co. P. C., p. 107." 1 Hale P. C., ch. 43, p. 504.

STATE v. JONES.

1871. SUPREME COURT OF NORTH CAROLINA. 65 N. Car. 395.

DICK, J.¹¹—There must be an asportation of the article alleged to be stolen, to complete the crime of larceny. The question as to what constitutes a sufficient asportation has given rise to many nice distinctions in the courts of England, and the rules there established have been generally observed by the courts of this country. Roscoe 570; 2 Bishop Crim. Law 804.

The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation. State v. Jackson, 65 N. C. 305. Where a parcel was not removed, its position only being altered on the spot where it lay, the judges in England held that there was not a sufficient asportation. Cherry's Case, 2 East P. C. 556.

In the case before us, the barrel of turpentine was turned from its head over on its side by the defendant with a felonious intent, but there was no other removal from the spot where it had been placed by the owners. We concur in the opinion of his Honor that there was not a sufficient asportation to constitute the crime of larceny. The defendant by his act used a false pretense, and if he deceived the owner of the turpentine, and by such deception received from the owner anything of value, he may be liable to indictment under our statute. Rev. Code, ch. 34, § 67.

There is no error. Let this opinion be certified. *Per Curiam*. Judgment affirmed.

STATE v. HIGGINS.

1885. SUPREME COURT OF MISSOURI. 88 Mo. 354.

HENRY, C. J.—The defendant and one McGuire were jointly indicted at the May term, 1883, of the St. Louis Criminal Court, for

¹¹ Statement of facts is omitted.

burglary and larceny, alleged to have been committed on the twenty-ninth of April, 1883. At the March term, 1883, defendant, Higgins, having been granted a severance, had a trial and was convicted of both burglary and larceny, and sentenced to three years' imprisonment in the penitentiary for the burglary, and two years for larceny. He has appealed from the judgment of the Court of Appeals, affirming that of the Criminal Court, and in the brief filed by his counsel, which is a model of brevity, he insists that "the record shows no proof of the larceny by defendant of a single cent, and only presumptive proof of the burglary." This is the only question we are asked to consider.

The testimony for the state was that of Frank Ritter, who testified that he was the son of Frank Ritter, who owned the saloon in which the alleged burglary was committed. That about two o'clock in the morning he locked up the saloon and left ten dollars in the till for the barkeeper, who came on watch about half-past five or six a. m.; that he then bolted the front door and locked the rear door from the outside. When he returned the next day he found that the bolt had been broken off of the front door. Rabmeyer testified to facts sufficient to establish the burglary against the defendant, and, also, that when he and the officers who arrested him got to the saloon they found the till on the floor, and some money scattered upon the floor, and that they picked up \$1.80. The testimony of O'Donnell and Viehle was to the same effect.

It is true, as urged by appellant's counsel, that there is no proof that any of the money was taken out of the saloon by the burglars, but in an indictment for larceny the caption and asportation consist "in removing the property alleged to have been stolen from the place where they were before, though they be not quite carried away." 3 Greenleaf's Evidence, § 154. As, "where a prisoner had lifted a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot, it was held a complete asportation." *Rex v. Walsh*, 1 Mood. C. C. 14; 3 Greenleaf's Evidence, § 154.

The judgment is affirmed. All concur, except Norton, J., absent.

STATE v. ALEXANDER.

1876. SUPREME COURT OF NORTH CAROLINA. 74 N. Car. 232.

BYNUM, J.¹²—The defendant was indicted for stealing a hog running at large in the "range." The hog was found dead, having

¹² Part of the case is omitted.

been shot. Its ears had been cut off, and one of its hams skinned, but the skin had not been severed from the animal, no part being cut off except the ears. There was no evidence that the hog had been killed elsewhere than where found, or had been removed from the spot where it had been killed. There was evidence that the defendant shot the hog and did the skinning. His Honor charged the jury that if the defendant shot and skinned the hog, as alleged, and had it under his control, with the intent to steal, there was in law a sufficient asportation, and he was guilty. There is error.

To complete the crime of larceny it is not sufficient that the defendant had the control of the article, that is, had the power to remove it, but there must be an asportation of the thing alleged to have been stolen. It is true, a very slight asportation will be deemed sufficient, yet there must be some removal to complete the offense. The case here shows that there was no removal of the hog, but that it remained *in situ*, as it had been shot down. In *The State v. Jones*, 65 N. C. 395, it was held that the turning of a barrel of turpentine, which was standing upon its head, over upon its side, with a felonious intent, was not such an asportation as constituted larceny. So in *The State v. Butler*, 65 N. C. 309, which is a case almost identical with this, it was held that an indictment at common law for stealing a cow is not supported by proof that the cow was shot down, and her ears cut off by the defendant with a felonious intent, because there was no asportation of the cow, the thing charged to have been stolen. These cases and others of our own, as well as English, are decisive. *State v. Jackson*, 65 N. C. 305; *Roscoe*, 570; 2 Bish. Cr. Law 804; 2 East P. C. 556. *Per Curiam*. Judgment reversed.¹³

HARRISON v. PEOPLE.

1872. COURT OF APPEALS OF NEW YORK. 50 N. Y. 518,
10 Am. Rep. 517.

Error to the General Term of the Supreme Court in the first judicial department, to review judgment affirming judgment of the Court of General Sessions of the Peace in and for the city and county of New York, entered upon conviction of plaintiff in error of the crime of grand larceny.

Henry H. Bull, collector of the Central National Bank of the city

¹³ Accord: *People v. Murphy*, 47 Cal. 103; *Williams v. State*, 63 Miss. 57; *Minter v. State*, 26 Tex. App. 217, 9 S. W. 561; *Molton v. State*, 105 Ala. 18, 16 So. 795, 53 Am. St. 97.

of New York, got onto a street car on the 25th of May, 1872. He had in his possession, in a pocketbook in his breast coat pocket, about \$25,000 in money and securities. As he was entering the door he was met by the prisoner, who put his hand into Mr. Bull's pocket, seized the pocketbook, and lifted it about three inches from the bottom of the pocket, when he was discovered by Mr. Bull, who seized the pocketbook and thrust it back into his pocket. The prisoner's counsel asked the court to charge that the jury under the evidence could not convict of any other offense than an attempt to commit larceny. The court refused so to charge. He did charge that the least removal of property from the place where it is deposited is a sufficient carrying away to constitute the offence of larceny, provided such removal in the opinion of the jury was of a felonious character. Counsel duly excepted. The jury rendered a verdict of guilty.¹⁴

FOLGER, J.—The plaintiff in error was indicted for simple larceny. The jury, having found him guilty, have fixed upon him the felonious intent. The questions raised in this court are presented by an exception to a refusal of the court to charge the jury that they could not convict of any other offense upon the testimony than an attempt to commit larceny; and an exception to the charge delivered to the jury that the removal of the property from where it was deposited was a sufficient carrying away to constitute larceny if it was of a felonious character.

Had the coat of the witness Bull, with the pocketbook in it, been off his back, hanging on a hook, the act of the plaintiff in error with felonious intent would, beyond question, have been larceny. Thus, in one case the prisoner, sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel and, both holding it, endeavored to pull it out, but were prevented by the guard. The prisoner being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was complete *asportavit* of the bag. (Walsh's Case, 1 Moody Crown Cases 14.) And in 2 Russell on Crimes 153 (margin 6, 4th ed., Lon.), this case purports to be cited from the MS. of Bayley, J.; and in the foot note (i) the text is said to correspond accurately with that of the MS.; and it is there said: "That if every part of the thing is removed from the space which that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient; so, drawing a sword partly out of its scabbard will constitute a complete *asportavit*."

Here, by the testimony, the pocketbook was lifted a space of

¹⁴ Arguments of counsel are omitted.

three inches from the bottom of the pocket, and every part of it was removed from the space which that part occupied before the plaintiff in error touched it.

But it is claimed that the article, being on the person of Bull, and in his actual possession, there is thereby a difference; and that there must be a severance of the goods from that possession. And *Rex v. Thompson* (1 Moody Crown Cases 78) is cited. The prisoner was there indicted for stealing from the person a pocketbook and contents. The book was in an inside front pocket of the owner's coat. The book was just lifted out of the pocket, an inch above the top of the pocket. By the forcible act of the owner the hand of the prisoner was brushed away, and the book fell back into the pocket. The prisoner was convicted and had the sentence for that offense. It was insisted that this did not amount to a taking from the person. Six of the ten judges who sat in review held that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor. Four of the judges were of the contrary opinion. But the ten were of one mind that the simple larceny was complete, and recommended a reduction of the sentence. A distinction, it seems, was taken between stealing from the person and a simple larceny; and all that the case holds to the benefit of this plaintiff in error is that such an act is not a stealing from the person. As above stated, he is not indicted for stealing from the person, but for feloniously stealing, taking and carrying away this property against the form of statute in such case made and provided. (2 R. S., p. 679, § 63.) And the judgment of the court, sentencing him to state prison for a term of five years, is in accord with the statute as to the punishment for the offense for which he was indicted.

Moreover, in *Regina v. Simpson* (Dearsly Crown Cases 421), which was a case of stealing from the person, Jervis, C. J., questioned the case of *Rex v. Thompson* (*supra*), saying that he thought that the minority of the judges there were right; but that the majority might have thought that the outer coat which covered the pocket formed a protection to the pocketbook. And Alderson, B., said there must be a removal of the property from the person; but a hair's breadth will do. *Regina v. Simpson* (*supra*) was larceny of a watch. The owner carried it in his waistcoat pocket, with one end of a chain attached to it, and the other end through a buttonhole of the waistcoat, and there kept by a watch-key. The prisoner took the watch out of the pocket and forcibly drew the chain through the buttonhole. His hand was then seized by the owner's wife; and it appeared that the point of the key had caught on the button of another hole, and was thereby suspended. It was contended that the prisoner was guilty of an attempt only. But the court thought that, as the chain had been removed from the buttonhole, the felony

was complete. The watch was temporarily, thought for a moment in his possession, it was said. Like this was *Lapier's Case* (1 Leach Crown Cases 320), who, snatching at a diamond ear-ring in a lady's ear, it was torn therefrom, but was found caught in the curls of her hair. He was found guilty of robbery from the person, for the ear-ring was in his possession for a moment, separate from the lady's person. And in *Commonwealth v. Luckis* (99 Mass. 431), which was an indictment for an attempt to steal from the person, the prisoner asked an acquittal on the ground that the larceny was complete, and so she could not be convicted of an attempt only. She was seen by a police officer with her hand in the pocket of another. He seized her wrist while her hand was there. She threw up her arm and tore the dress, so that the pocket and pocketbook fell to the ground. There was no evidence that her hand was upon the book. The judge charged that if she was arrested in her attempt before her hand reached or disturbed the book, she might be convicted of an attempt; but if her hand had reached or seized the pocketbook, and she altered the position of it in the attempt to secure or retain it, this would be such a caption or asportation as would acquit the defendant; and she was convicted. On exceptions taken to the charge, the court above held: That to justify a conviction, it was necessary to show that she failed in the perpetration of the offense of stealing from the person, which could be complete only when the property was in her full custody or control. It was not indeed, the court said, necessary that the pocketbook should be removed from the pocket, if once within the grasp of the thief, to constitute larceny. But the prisoner must, for an instant, have had perfect control of the property.

To constitute the offense of larceny there must be a taking or severance of the goods from the possession of the owner. (2 Russ. on Crimes, p. 152, margin 6.) But possession, so far as this offense is concerned, is the having or holding or detention of property in one's power or command. It is the sole control of the property, or of some physical attachment to it; as in the case of *Wilkinson* (1 Leach 321, note a), where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take, and had the purse in his hand, but the strings of the purse still held to the pocket by means of the keys. This was held to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where it was before. And so, where goods in a shop were tied by a string to a counter, a thief took up the goods and carried them to the door, as far as the string would let him, and was there stopped. This was held no felony. (2 East Crown Law 556.) Here was an actual, physical connection of the goods to the person or to the other property of the owner; and the complete carrying away was thwarted, not by

the animate, forcible act of the owner taking back that which had for the instant passed from his control, but by the inanimate, self-acting detention of that which held it to the person or to the realty. That needed first to be severed before there could be a carrying away. (And see Philips' Case, 4 City Hall Recorder 177.) In *Rex v. Thompson* (*supra*), however, and in *Luckis' Case* (*supra*), as put in the charge and in the opinion, by the raising of the book out of the pocket of the owner, or by the grasp and movement of it in the pocket, the owner was held to have lost that control of it which is possession, so that the felonious act of larceny was complete. There was no fastening there to be severed. It needed forcible action by him to retake it. Mere quiescence would not do it. Without that action, with the book in the grasp of the thief possessing it, controlling it and carrying it away, it would have been beyond recaption by him. So in the case here. The hand of the plaintiff in error was about the book, controlling it and taking it away; indeed, had taken it away (as in *Walsh's Case*, *supra*), every part of it, from the space which that part had occupied before his touch. It was in his possession. He directed, and, for the instant of time, controlled its movements. No inanimate, physical thing hindered him. Bull, for that instant of time, did not control or possess it; but, feeling him raising the book, threw up his own hand, pressed the book, caught it as it was going, and regained control and possession of it. But for this action it would have been taken entirely away. Who, then, for that instant, controlled it and had it in possession?

There is no essential distinction in the cases. In *Rex v. Thompson* (*supra*) and in this case, as in the cases of the watch and of the ear-ring, there was temporary possession by the larcenor, though but momentary.

There was sufficient *asportavit*.

The judgment of courts below should be affirmed.

All concur.

Judgment affirmed.¹⁵

CLARK v. STATE.

1910. COURT OF CRIMINAL APPEALS OF TEXAS.
59 Tex. Cr. 246, 128 S. W. 131.

Appeal from District Court, Bexar County; Edward Dyer, Judge. Will Clark was convicted of theft, and he appeals. Reversed and remanded.

¹⁵ Accord: *State v. Chambers*, 22 W. Va. 779, 46 Am. Rep. 550; *Flynn v. State*, 42 Tex. 301; *State v. Craige*, 89 N. Car. 475, 45 Am. Rep. 698; *Eckels v. State*, 20 Ohio St. 508.

DAVIDSON, P. J.¹⁶—Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

The evidence discloses that appellant had been convicted of burglary, and his punishment assessed at three years' confinement in the penitentiary; the indictment in this case being for the alleged theft committed in connection with that burglary. Plea of former conviction was interposed, but not considered, upon the trial of this case. The action of the court in this matter was correct. Under our statute a party can be convicted of burglary as well as of the offense committed after the burglarious entry. The conviction of one can not be pleaded in bar of the other.

It is further disclosed that appellant was found in the store burglarized, by an officer, and arrested. In a showcase in the store was the figure of a woman used for the display of goods. On this figure was a dress and a cloak; the cloak being valued at \$40 and the dress at \$85. Appellant had taken the cloak from the figure, rolled it up and laid it on the floor, and was trying to take off the dress at the time the officer arrested him, but had not succeeded. The dress, as testified by the owner of the store, had been pulled down to the bottom of the figure, but had not been removed. He further testified that the dress could not be removed in that manner, that it would have to be taken off over the head of the figure. This, in substance, is the state's case.

1. Among other contentions made is that the evidence does not support the verdict of the jury. We are of opinion that this contention is correct in so far as a felony conviction is concerned. If appellant had removed the cloak from the figure and had gotten possession of it in this manner, this would constitute theft, but we are of opinion, with reference to the dress, that he could not be convicted of theft. In order to constitute theft the thief must have complete control of the thing sought to be stolen. Mr. Bishop in his *New Criminal Law* (§ 795) says: "This control must be of such importance that no imperfect control, whether brief or protracted, will be sufficient." He further says: "Where goods in a shop were tied to a string attached at one end to the counter, a thief who carried them as far away as the string would permit was held not to have committed larceny of them, because of their being thus attached." The same rule was applied where a purse, fastened by a string to a bunch of keys in the pocket, was taken therefrom, while the keys remained. In the foot notes quite a number of cases are cited supporting the text. In *Harris v. State*, 29 Tex. Cr. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717, this court approvingly quoted the doctrine laid down by Mr. Bishop, using this quotation: "The doctrine is that any removal, however slight, of the entire article, which is not attached either to the soil or to any other

¹⁶ Part of the opinion is omitted.

thing not removed, is sufficient, while nothing short of this will do. Therefore, if the thief has the absolute control of the thing but for an instant, the larceny is complete." The Harris Case has been followed in subsequent cases by this court. The same doctrine is laid down in *Tarrango v. State*, 44 Tex. Cr. R. 385, 71 S. W. 597, in an opinion written by Judge Brooks, and was followed in *Rodriguez v. State*, 71 S. W. 596. The latter was a case of theft from the person. The owner testified that he felt something pulling at his shirt front, and, upon looking around to ascertain what it meant, saw some one undertaking to unscrew from his shirt a valuable diamond pin. The party had succeeded in about half unscrewing it when the owner caught his hand, and held him until an officer came. The court says: "We agree with appellant that this is not sufficient evidence to show a taking. It was unquestionably an attempt to get possession, but it is as clearly evident that by reason of the owner's interference appellant did not obtain such possession. It was not removed from the shirt front, but at the time of appellant's arrest it still remained fastened to the shirt." This seems to be the doctrine of the cases in the different jurisdictions in regard to the question of theft: that is, that a party must obtain complete control of the property undertaken to be stolen, and that it must be segregated in such way that it passes entirely into the control of the thief. In *People v. Meyer*, 75 Cal. 383, 17 Pac. 431, this doctrine was announced and followed. The court stated the facts in that case about as follows: Lewis Joseph testified: "I had, as usual, placed and buttoned an overcoat upon a dummy, which stood on the sidewalk outside of my store. I was inside the store, and heard the chain of the dummy rattle, and on coming outside found defendant with said coat unbuttoned from the dummy and under his arm, the same being entirely removed from the dummy, and about two feet therefrom and from the place where it had been originally placed on the dummy by me, and accused was in the act of walking off with said coat when grabbed by me, he being prevented from taking it away because said coat was chained to the dummy by a chain which ran through the coat sleeve, and the dummy was tied to the building by a string." The court further says: "This was the only evidence introduced to prove the charge of larceny." On this evidence a conviction was obtained. The court, approving the language used by Mr. Bishop, held that this was not such a taking as would constitute the crime of theft. It is evident from the testimony in this case, as introduced by the state, that appellant had not reduced the dress to his control so as to constitute a taking. It had not been removed from the figure, nor had the figure been removed from its accustomed place. If appellant had succeeded in getting the dress off the figure or had detached the figure from its place, and reduced it to control or removed it, then whatever was upon the

figure might have been reduced to possession by this means. We believe the doctrine to be sound that in order to constitute a taking there must be a reduction of the property to the complete control of the taker; otherwise it would not be theft as defined by our statute. It is not necessary under our statute that the property be carried away, but there must be a reduction to the control and possession of the thief. In this case we are of opinion that the dress had not been reduced to such possession, and therefore, so far as that article was concerned, the state failed to make a case. Omitting the dress from the computation of value, the cloak is shown to be worth only \$40. Therefore the taking of the cloak would be but a misdemeanor. Appellant would not be guilty of a felony, but a misdemeanor. * * *

Reversed and remanded.

STATE v. ROZEBOOM.

1910. SUPREME COURT OF IOWA. 145 Iowa 620, 124 N. W. 783.

The defendant was convicted of larceny and appeals. The material facts are stated in the opinion.

WEAVER, J.¹⁷—* * * Counsel appear to base their demand for a reversal very largely on the alleged failure of the state to prove any asportation of the property charged to have been stolen. It will be remembered that the tubs of butter shipped by Day from Rock Valley were shown to have been placed in one end of the car, and it is the theory of the state that defendant removed several of these tubs to the clear floor space between the doors and there altered the address which had been placed on the covers. * * *

It is true that in order to constitute larceny it must appear that the property was not only stolen and taken by the thief but also that it was "carried away" by him. To use the more ancient and technical expression, there can be no larceny without asportation. But this has never been held to mean that it is essential to a complete larceny that the thief shall so far succeed in removing the property that it is completely and permanently lost to the owner. If the wrongdoer by trespass obtain complete possession and control of an item of personal property belonging to another with the felonious intent to deprive the owner thereof, and carries it or moves it in the slightest degree from the place where he finds it, the asportation is complete, and the crime of larceny has been committed. As is very natural, border-line cases have given rise to some very nice distinctions for most of which valid reasons may

¹⁷ Part of the opinion is omitted.

be given. For instance, where a thief, with intent to steal, picked up a package of goods tied by a string to a merchant's counter, but did not succeed in severing the string before he was detected and arrested, it was held the larceny was not complete because the accused never had the goods in his complete possession; but had he broken the string and then dropped the goods, or had been arrested before leaving the store with them, the crime would have been fully consummated. So, also, the accused took a purse from the pocket of another, but did not succeed in carrying it away because of its being fastened by a small chain to the owner's clothing, it was held there was no asportation and therefore no larceny. On the other hand, where the accused snatched a watch from the pocket of the owner, breaking the chain which, in the movement, caught in a button on the owner's coat and was thus saved, it was held to be a case of complete larceny because, in the short interval between the breaking of the chain and the entanglement with the button, the watch had been wholly within the possession of the trespasser. The same rule has been applied where a thief pulls a ring from a lady's ear, although the jewel immediately fell from his fingers and lodged in the owner's hair. It has frequently been held that the least removal of the property from the place where the thief finds it, with intent to steal it, is a sufficient asportation. 2 Russell on Crimes 4; *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517.

Says the West Virginia court in defining a complete larceny: "The property taken must also be carried away. It need not be retained in the possession of the thief. Any removal, however slight, of the entire article, which is not attached to the soil or to any other thing not removed, is sufficient, but nothing short of this will do. Therefore if the thief has absolute control of the thing but for an instant and he removes it, ever so little space, the larceny is complete. * * * Upon the question what is a sufficient asportation or carrying away of goods feloniously taken, the authorities, both ancient and modern, uniformly hold that the felony lies in the very first act of removing the property, and therefore the least removing of the thing taken from the place it was in before is a sufficient taking, though it be not quite carried off." *State v. Chambers*, 22 W. Va. 779, 46 Am. Rep. 550. The precedents holding to this rule are very numerous. Illustrative examples are found in *Eckles v. State*, 20 Ohio St. 508; *Gettinger v. State*, 13 Nebr. 308, 14 N. W. 403; *State v. Gazell*, 30 Mo. 92.

We find no authority which goes to the extent of holding it necessary to complete asportation that the stolen article must be lifted entirely from the ground or floor or other thing on which it rests, provided, of course, there be no unsevered attachment by which such article is bound or fastened to some other thing which is not

removed. It is true that as we approach the border line where criminal intent, which of itself is not crime, materializes into an act which is a crime, distinctions are of a necessity somewhat finely drawn, but they always have a basis in sound logic and reason. We are unable to find any support for the rule insisted upon by the appellant. If the tubs of butter shipped from Rock Valley were placed in one end of the car, and appellant took them from such place to the open space in the middle of the car, with the felonious intent to mingle them with his own and thereby deprive the owner of his property, it is entirely immaterial whether he accomplished the removal by lifting and carrying the tubs in his arms, or by rolling or pushing or pulling them along upon the car floor without lifting them clear therefrom. There is also another theory on which the asportation may be held to have been complete. If the appellant erased the address from any of the tubs of butter shipped by Day and replaced it by the address of his own consignees for the purpose of having the carrier transport them to said consignees as his own property, he would properly be held to have made the railway company his agent for such transportation, and the carriage of the property by such agent would be his act and constitute an asportation within the meaning of the law. See *Commonwealth v. Barry*, 125 Mass. 390. In the cited case the changing of a check upon a trunk in the possession of a railway company, by which device the carrier was induced to transport the trunk to another city and deliver it to the wrongdoer or to a confederate, was held to be larceny. We regard it very clear that there was no error in refusing the instructions asked by the appellant or in those given by the court. * * *

We find no reversible error in the record, and the judgment of the district court is affirmed.¹⁸

(D) POSSESSION.

(c) How Possession Must Be Acquired.

"All felony includes trespass, and every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he can not be guilty of felony in carrying them away." 1 Hawkins P. C. ch. 33, § 2.

¹⁸ Accord: *Aldrich v. People*, 224 Ill. 622, 79 N. E. 964, 115 Am. St. 166, 7 L. R. A. (N. S.) 1149, 8 Ann. Cas. 284.

REX v. MUCKLOW.

1827. CROWN CASE RESERVED. 1 Moody C. C. 160.

The prisoner was tried before Mr. Justice Holroyd, at the Spring Assizes for the county of Warwick, in the year 1827, upon an indictment which charged him with stealing a bill of exchange for ten pounds eleven shillings and sixpence, the first count stating it to be the property of John Lea and others, and the second count as the property of one other James Mucklow. There were two other counts stating it to be a warrant for the payment of ten pounds eleven shillings and sixpence, instead of a bill of exchange.

The instrument in question was a draft drawn by John Lea & Sons, on the day it bears date, at Kidderminster (where they carried on business) on their bankers at the same place, and was as follows:

"Kidderminster, Dec. 1, 1826.

"Messrs. Wakeman and Turner, Bankers,
Kidderminster.

"Pay Mr. James Mucklow, or bearer, ten pounds eleven shillings and sixpence.

"£10.11s.6d.

John Lea & Sons."

This draft was unstamped, and was written on the same sheet of paper with a letter, directed James Mucklow, Saint Martin's Lane, Birmingham, and was sent by Lea & Sons by the post to Birmingham, which is eighteen miles from Kidderminster.

No person of that name being found or heard of to be living in Saint Martin's Lane, Birmingham, and the prisoner living in a house, about a dozen yards from Saint Martin's Lane, with his father, Joseph Mucklow (who was included in the same indictment, but acquitted), the postman, on the second of the same December, called with the letter at their house, when they were out, and left a message that there was a letter for them, which they were to send for; and it was in consequence thereof, on the same day, delivered to the father, and afterwards came to the hands of the prisoner, his son, who appropriated the draft to his own use, and received payment of it, under circumstances proved by evidence arising from the contents of the letter, and otherwise, that satisfied the jury he knew the letter and draft were not intended for him, but for another person, and upon which they found him guilty of the larceny.

The letter and draft were intended for another Mr. James Mucklow, then of New Hall Street, Birmingham, to whom Messrs. Lea and Sons were then indebted, to the amount of the sum contained in the draft, for goods sold and delivered; but it was misdirected to Saint Martin's Lane by mistake, and sent by the post, in conse-

quence of an application by letter by that James Mucklow to them for payment, as the goods were sold for cash.

It was objected that this could not in law amount to larceny, as the possession of the letter and draft had been voluntarily parted with by Lea and Sons, and also by the postman, and without any fraud on the part of the prisoner; and Story's Case, Russ. & Ry. C. C. R. 81, and Walsh's case, *ibid.* 215, were cited.

Two other doubts also occurred, one on the want of a stamp on the draft, as otherwise this would operate as an evasion of the stamp law, it being a draft for the purpose of making a payment to a person at a distance of more than ten miles; and query if not therefore void? And if so, then not the subject of larceny, or receivable in evidence as such. See Stat. 55 G. 3, ch. 184, Sched., part 1, Exemption:" All drafts to bearer or bankers, within ten miles of where such drafts or orders shall be issued, provided such place be specified therein, and bearing date on or before the day on which they are issued; "and query, whether the draft, be issued (that is, whether its being issued is complete) till the delivery of the letter at Birmingham, which is at the distance of more than ten miles from the banking-house?

The other doubt arose upon objection made in Phipoe's case, 2 East P. C. 599, and in Walsh's case, Russ. & Ry. C. C. R. 220, that this draft was not the goods and chattels of John Lea & Sons, and of no value in their hands; and that it had not become the property of the James Mucklow for whom it was intended, so as to be considered as his valuable property. See also Clark's case, Russ. & Ry. 181.

The learned judge respited the judgment, to take the opinion of the judges on these points.

At a meeting of the judges in Easter Term, 1827, this conviction was held wrong, on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter; and a pardon was recommended.

REGINA v. THRISTLE.

1849. COURT OF CRIMINAL APPEALS. 3 Cox Cr. C. 573.

The two following cases were reserved by the Worcestershire Court of Quarter Sessions:

First Case.

The prisoner, William Thistle, was indicted at Worcester Quarter Sessions, 15th October, 1849, for stealing one watch, the property of Robert Warren.

It appeared in evidence that the prosecutor, in 1848, met the prisoner, who was a watchmaker at Malvern. The prosecutor asked prisoner if he was going as far as prosecutor's house; the prisoner said "Yes," if the prosecutor had anything for him. The prosecutor said his watch wanted regulating, if the prisoner would call.

The prisoner went to the prosecutor's house, and after examining the watch told the prosecutor's wife that he could do nothing with it there, but must take it to his own house. The prisoner then took it, and on his way home met the prosecutor, to whom he mentioned that he was taking the watch to his own house, and would return it in two or three days. Prosecutor made no objection.

In a few weeks after, prisoner left the neighborhood without returning prosecutor's watch, and it was not afterwards heard of. The prisoner, on being taken into custody, said: "I have disposed of the property, and it is impossible to get it back."

The jury returned a verdict of guilty, but the chairman, being of opinion that there was no evidence of felonious taking when the prisoner first took the watch from the prosecutor's house, with the knowledge and in the presence of the prosecutor's wife, and entertaining doubt whether the prisoner's subsequent appropriation of the watch could, under the circumstances above detailed, constitute larceny, requests the opinion of this court as to the correctness of the conviction in point of law.

Second Case.

The same prisoner was also indicted at the same sessions for stealing one watch, the property of the prosecutor, Thomas Reynolds. It appeared in evidence that the prisoner, who was a watchmaker at Malvern, received from the prosecutor some time in January, 1848, his silver watch to repair. The prisoner returned it to the prosecutor. A few days after the prisoner had so returned it, the prosecutor told the prisoner that the watch gained. The prisoner said that if the prosecutor would let him have it again he would regulate it and return it in a day or two. The prosecutor thereupon gave the watch to the prisoner, who, in eight or nine days, left Malvern with the prosecutor's watch in his possession, and was not again heard of until he was arrested on the present charge some time afterward.

The prosecutor was unable to say whether he had paid for the repairs of his watch or not, but stated that the prisoner, when he left Malvern, had other repairs of the prosecutor's on hand and unfinished.

The prisoner, when taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury found a verdict of guilty, but the chairman, being of opinion that there was no evidence of a felonious taking on the part of the prisoner, when he received the watch from the prose-

cutor to regulate it, and entertaining a doubt whether the subsequent departure of the prisoner from Malvern with the prosecutor's watch in his possession, could, under the circumstances above detailed, constitute larceny, requests the opinion of this court, as in the former case.

[See 2 Russ. on Crimes (last ed.), p. 56, where it is said: "Where it appears that the delivery of the goods by the owner or person authorized to dispose of them was not obtained fraudulently and with intent to steal, a remaining inquiry may be whether such lawful possession has been determined and whether there has been any new felonious taking. Thus it has been held that if a carrier take a pack of goods to the place appointed, and deliver or lay it down, his possession is determined, and if he afterwards carry it away with intent to steal it, this will be a new taking and felonious. (3 Inst. 107, 1 Hale 505.) If the lawful possession has not been determined, the goods will continue in the possession of the party to whom they were delivered by bailment, and the general principle of law will prevail, "that if a person obtain the goods of another without fraud, although he have the *animus furandi* afterwards and convert them to his own use, he can not be guilty of felony." (3 Inst. 107, 2 East P. C., ch. 16, § 113.) A principle which has been holden to extend to the cases of a tailor, who has cloth delivered to him to make clothes with; a carrier who receives goods to carry to a certain place; and a friend, who is entrusted with goods to keep for the use of the owner; which they afterward severally embezzle. (Staundf. P. C., ch. 25; 1 Hale 504, 505; 1 Hawk. P. C., ch. 33, § 2). And so, if a watch be delivered to a person to mend, and he sells it, this has been held not to be larceny. (R. v. Levy, 4 Car. & P. 241.) And so, also, if plate be delivered to a goldsmith to work or to weigh, or as a deposit, it has been held that his conversion of it will not be felony. (3 Hen. 7, pl. 12, cited 1 Show. 52; 2 East P. C., ch. 16, § 113.) It has, however, been already noticed that some of the cases of this nature seem to make a near approach to those where a bare charge or mere special use of the goods is transferred by the delivery, and where consequently the legal possession of them remaining exclusively in the owner, larceny may be committed in respect of them, exactly as if no delivery at all had been made;" (See, also, R. v. Thurborn, 1 Den. C. C. 387; s. c. Nom. R. v. Wood, 3 Cox's Crim. Cas. 453; R. v. Stear, 1 Den. C. C. 349; 3 Cox C. C. 187.)]

These cases were not argued by counsel, but were considered by the following judges: Pollock, C. B., Patterson, J., Wightman, J., Platt, B., and Talfourd, J.

Pollock, C. B., delivered the judgment of the court. The indictment was for stealing a watch; and the circumstances set out in the case do not, on the question of fact, justify the verdict of guilty;

but in giving our judgment that the conviction is wrong, we do not proceed merely upon the facts stated. The question put to us in the conclusion of the case seems to be this: The chairman doubted whether a subsequent appropriation could make the entire transaction a larceny, there not having been at the time of the taking any *animus furandi*; and I think we are bound to take it that he directed the jury that the subsequent appropriation might render the transaction larceny, though there was not any intention to steal at the time of the taking; and, indeed, the chairman's opinion seems to have been that there was not the *animus furandi* at the time of the taking; and the question is whether he was right in his direction. We think not, for unless there was a taking *animo furandi* no dishonest appropriation afterwards could make it larceny.

Conviction reversed.

PEOPLE v. CRUGER.

1886. COURT OF APPEALS OF NEW YORK. 102 N. Y. 510,
7 N. E. 555, 55 Am. Rep. 830.

DANFORTH, J.¹⁰—The conviction is for stealing, on the 10th of March, 1885, a diamond pin, the property of one Porteous. It appeared in evidence that the defendant was engaged in the business of buying and selling jewelry, and of effecting loans upon personal property; that before the time in question there had been dealings between the parties in relation to the pin, but on that day it was in the possession and under the sole control of Porteous, who, as he testified, left it with the defendant to be sold, but, according to the testimony of the defendant, Porteous wanted him to procure a loan upon it, and did not direct a sale. It also appeared that at the police court, on the 26th of April, 1885, at an examination concerning the same transaction, Porteous was asked this question: "You authorized a loan?" and answered "Yes, sir, when he" (the defendant) "suggested either a loan or a sale." Other circumstances in evidence sustain the defendant's version, and there are some which might impair the credit of the complainant as a witness. There was sufficient evidence that the defendant did procure the loan from one Hawkins. At the close of the testimony the defendant moved for a direction of a verdict of acquittal, on the ground that "the indictment charges distinctly a larceny of a certain particular pin, and the evidence being perfectly clear that the pin was left with the defendant for the purpose of procuring a loan on it, that he did procure a loan on it, acting exactly within the

¹⁰ Arguments of counsel are omitted.

scope of his authority, and doing precisely what it was left with him for, he can not be convicted under this indictment of the larceny of this pin."

The court denied the motion, saying: "The complainant claims that there was no such authority conferred upon him" (the defendant), "that it was left with him for the purpose of sale and not for the purpose of pledging."

The defendant then asked the court to charge the jury as follows: "The indictment being for the larceny of a certain pin, if the jury believe that the complainant, being the owner of the pin, authorized the defendant to obtain a loan upon it, and the defendant did actually obtain that loan from Mr. Hawkins (the witness who has testified), as authorized by the complainant, they can not convict the defendant under this indictment of the larceny of the pin."

The court declined to do so. The exception then taken presents the only question we think it necessary to consider. The proposition presented by the request negated every ingredient of the offense charged, and if found in favor of the defendant would have made a conviction impossible. If the owner intended to part with the property for a special purpose, and the defendant used it only in the way prescribed, it could not be said to be stolen. There could have been neither a false pretense nor a felonious taking on his part. It is said, however, by the learned counsel for the respondent that the request asked too much, because it did not take in the possible intent of the defendant "at the time of procuring the loan" to appropriate the proceeds to his own use. This by no means answers the exception, for if found according to the propositions of the request, it would appear that the defendant received the property lawfully and disposed of it according to the wish of the owner, that he not only obtained the loan, but obtained it as authorized. The request might have been amplified, but it was unambiguous, and contained a proposition good in law and to the benefit of which the defendant was entitled. An omission to account for the proceeds of the loan could not, by relation, change the voluntary act of the owner in parting with the pin into a larcenous taking by the defendant, nor sustain the allegation upon which the indictment stood, that the defendant "feloniously did steal, take and carry away" the property in question. There may have been a breach of trust and even fraudulent conversion of the proceeds of the loan, but that does not constitute the offense charged. The exception was well taken.

The judgment and conviction should, therefore, be reversed and a new trial granted.

All concur.

Judgment and conviction reversed.

ROSE v. STATE.

1907. COURT OF CRIMINAL APPEALS OF TEXAS.
52 Tex. Cr. 154, 106 S. W. 143.

Appeal from Anderson County Court. Tried below before the Hon. R. E. Erwin, J.

Appeal from a conviction of a misdemeanor or theft; penalty, a fine of \$25 and two days' confinement in the county jail.

The opinion states the case.

DAVIDSON, P. J.²⁰—This prosecution and conviction was for a misdemeanor theft; punishment being assessed at \$25 fine and two days in the county jail.

The court gave the following charge: "You are further instructed the fraudulent taking, in order to constitute theft, need not be the taking from the actual possession of the owner; but if taken without his consent, when not in his actual custody, with the intent to deprive him of the value thereof and to appropriate it to the use and benefit of the person taking it would constitute theft."

This is an enunciation of a correct rule of law. The testimony shows that the alleged owner left his pocketbook in his pants pocket in that part of the house where appellant was at work, going off forgetting it; or rather, perhaps, to be more correct about the statement, it was left in the pocket of a pair of pants which he had left at the place where appellant was at work to be repaired, or for some work to be done on them. The owner subsequently put on his pants, and went out in town, and missed his pocketbook, which contained about \$5 in money and a drink check on the Buckhorn saloon. He went back to the place and made inquiry for his property. Appellant denied any knowledge of it, and a policeman was informed of the circumstances and a description of the property given; among other things a description of the drink check that was in the pocketbook when missed. The policeman went to the Buckhorn saloon and inquired if any one had recently paid in at that place a drink check. Being informed in the affirmative, the bartender placed before him the drink ticket that appellant had paid him, with several other drink tickets that he had on hand. This drink check was secured and identified by the owner as his property. The pocketbook and money were not recovered.

Under these circumstances we think this charge was correct. The court may have even gone further and informed the jury that if the owner had left his pants at the place in question, containing the pocketbook with \$5 in money and the drink check, and if appellant had found and taken from the pants pocket said pocketbook

²⁰ Part of the opinion is omitted.

with its contents, without the consent of the owner, the taking would be fraudulent and would authorize a conviction. It is not necessary always that the property shall be in the actual personal possession of the owner. A familiar illustration of this proposition is that cattle and horses running on their accustomed range are in the possession of the owner, as is lost property. * * *

As the case is presented, we fail to find any such error as would require a reversal of the judgment and it is therefore affirmed.

Affirmed. Henderson, J., absent.

HILL v. STATE.

1883. SUPREME COURT OF WISCONSIN. 57 Wis. 377, 15 N. W. 445.

Error to the Municipal Court of Milwaukee County.

The plaintiffs in error were convicted of larceny. The facts sufficiently appear from the opinion.

ORTON, J.²¹—The information was for the larceny of a horse, the property of Silas Barber, the keeper of a livery stable in the city of Waukesha. The defendant Lawrence, on the 10th day of September, at five o'clock in the afternoon, hired the horse, with a top buggy, to go to a place called Honeyakers, about three miles from Waukesha, to be returned at nine or ten o'clock that evening. The defendant Hill was taken into the buggy before leaving Waukesha, and a short distance from that place on the road to the city of Milwaukee the buggy was turned over and the top torn off and left, and they drove on together to Milwaukee that night. The next day Hill was at Oak Creek, in Milwaukee county, on the road to Racine, with the horse and a part of the harness, and tried to sell the horse there and was arrested, and Lawrence was arrested in Milwaukee. They both prevaricated as to their names, residence, and destination. The municipal court of the county of Milwaukee refused the following instruction asked on behalf of the defendants: "That if the defendants, at the time said horse was hired, had no intent to steal it, the subsequent appropriation of the same to their own use is a mere conversion and is not larceny." And the court gave the following instruction, which was excepted to on behalf of the defendants: "If you believe their statements against Barber's and his man's that was in the stable at the time, that they hired the horse for an indefinite purpose and agreed to be back before ten o'clock at night, and that they afterwards went to Milwaukee and formed a design to sell the horse after that time, at any time be-

²¹ Part of the opinion is omitted.

fore they were caught, you will be justified in finding they had that intention at the time they took the horse."

The instruction refused substantially expressed the law, and ought to have been given, and the instruction given was clearly erroneous, because against the law so expressed. It may at one time have been considered the law of larceny that although the hiring and taking, in the first place, might have been bona fide, yet if the time for which the hiring was made had expired and the property is afterwards converted, it is larceny. But such has not, for a long time, been considered the law, and it is now stated correctly as follows: that "when the horse was delivered on a hire or loan, and such delivery was obtained bona fide, no subsequent wrongful conversion, pending the contract, would amount to a felony." 2 Russ. on Crimes (9th ed.), § 237. The exception to this rule has no application to this case. "If one hires a horse and sells it before the journey is performed, or sells it after, before it is returned, he commits no larceny, in a case where the felonious intent came upon him subsequently to receiving it into his possession." 2 Bish. Crim. Law, § 864.

This statement of law should be qualified by saying, if he hires the horse in the first place with a bona fide intention of returning it according to the contract of hire, the circumstances of the conversion of the property subsequently, and of not even entering upon the performance of the contract of hire, but taking the property elsewhere, and of other matters evincing it, may be evidence of an intention to convert the property at the time of the hiring. But a subsequent conversion of the property merely may not be sufficient evidence of such an original intent. In a case, very similar to this in its facts, of *Regina v. Brooks*, 8 Car. & P. 295, it is held that the subsequent offer to sell the property was not considered sufficient evidence of the felonious hiring or taking in the first place, unless from the circumstances it appears that the hiring was only a pretext, made use of to obtain the property for the purpose of afterwards disposing of it.

The law applicable to this case is as well stated in *Semple's Case*. 2 East's P. C. 691, as in any which can be found in the books: "It is now settled that the question of intention is for the consideration of the jury, and if, in the present case, the jury should be of opinion that the original taking (of the property) was with the felonious intent to steal it, and the hiring a mere pretense to enable him (the prisoner) to effectuate that design without any intention to restore it or pay for it, the taking would amount to a felony; * * * but if there was a bona fide hiring and a real intention of returning it at that time, the subsequent conversion of it could not be a felony." See, also, *Pear's Case*, *id.* 685; *Charleswood's Case* 689. The principal is more briefly stated (*id.*, 665): "If it be proved

that there was no trespass or felonious intent in taking the goods, no subsequent conversion of them can amount to a felony." These authorities were furnished by the learned counsel of the plaintiffs in error, in his brief, and are amply sufficient, we think, to show the error complained of. * * *

By the Court.—The judgment of the municipal court is reversed, and the cause remanded for a new trial. And it is ordered that the warden of the state prison deliver the defendants into the custody of the sheriff of Milwaukee county, to be safely kept by him for trial, or until duly discharged from his custody according to law.

STATE v. COOMBS.

1868. SUPREME JUDICIAL COURT OF MAINE. 55 Maine 577,
92 Am. Dec. 610.

Indictment for the larceny of a horse, sleigh, harness, and three robes. The complainant testified that the defendant hired the team to go to Minot Corner, and promised to return it within four or five hours; that, instead of going to the place to which he hired it to go, the defendant went to other places, and finally sold the property without the complainant's consent.

The defendant testified that when he hired the team he did not intend to steal it and that his subsequent sale and disposition of the property was while he was in a state of intoxication; and his counsel invoked in his behalf the rule of law that where a party comes lawfully into possession of property by a contract of hiring, a subsequent sale and conversion of it does not constitute larceny. * * *

The jury returned a verdict of guilty, and the defendant alleged exceptions.²²

DICKERSON, J.—Exceptions. The prisoner was indicted for the larceny of a horse, sleigh, and buffalo robes. The jury were instructed that if the prisoner obtained possession of the team by falsely and fraudulently pretending that he wanted it to drive to a certain place, and to be gone a specified time, when in fact he did not intend to go to such place, but to a more distant one, and to be absent a longer time, without intending at the time to steal the property, the team was not lawfully in his possession, and that a subsequent conversion of it to his own use, with a felonious intent while thus using it, would be larceny.

It is well settled that where one comes lawfully into possession of the goods of another, with his consent, a subsequent felonious

²² Charge of the court below, and arguments of counsel are omitted.

conversion of them to his own use without the owner's consent does not constitute larceny, because the felonious intent is wanting at the time of the taking.

But how is it when the taking is fraudulent or tortious, and the property is subsequently converted to the use of the taker with a felonious intent? Suppose one takes his neighbor's horse from the stable, without consent, to ride him to a neighboring town, with the intention to return him, but subsequently sells him and converts the money to his own use, without his neighbor's consent, is he a mere trespasser, or is he guilty of larceny? In other words, must the felonious intent exist at the time of the original taking, when that is fraudulent or tortious, to constitute larceny?

When property is thus obtained, the taking or trespass is continuous. The wrongdoer holds it all the while without right, and against the right and without the consent of the owner. If at this point no other element is added, there is no larceny. But if to such taking there be subsequently superadded a felonious intent, that is, an intent to deprive the owner of his property permanently without color of right or excuse, and to make it the property of the taker without the owner's consent, the crime of larceny is complete. "A felonious intent," observes Baron Parke in *Regina v. Holloway*, 2 Car. & K., 61 E. C. L. 944, "means to deprive the owner, not temporarily, but permanently, of his own property without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner."

The case of *Regina v. Steer*, 2 Car. & K., 61 E. C. L. 988, is in harmony with this doctrine. The prosecutor let the prisoner have his horse to sell for him; he did not sell it, but put it at a livery stable. The prosecutor directed the keeper of the stable not to give up the horse to the prisoner, and told the prisoner he must not have the horse again, to which the prisoner replied, "Well." The prisoner got possession of the horse by telling a false story to the servant of the keeper of the stable, and made off with him. The case was reserved, and the court held the prisoner guilty of larceny. *Commonwealth v. White*, 11 Cush. 483.

In the case at bar the prisoner obtained possession of the property by fraud. This negatives the idea of a contract, or that the possession of the prisoner was a lawful one when he sold the horse. He was not the bailee of the owner, but was a wrongdoer from the beginning; and the owner had a right to reclaim his property at any time. It has been decided that when a person hires a horse to go to a certain place, and goes beyond that place, that the subsequent act is tortious, and that trover may be maintained on the ground of a wrongful taking and conversion. *Morton v. Gloster*, 46 Maine 520.

In contemplation of law, the wrongful act was continuous, and,

when to that act the prisoner subsequently added the felonious intent, that is, the purpose to deprive the owner of his property permanently, without color of right or excuse, and to convert it to his own use without the consent of the owner, the larceny became complete from that moment. The color of consent to the possession obtained by fraud does not change the character of the offense from larceny to trespass or other wrongful act. In such case, it is not necessary that the felonious intent should exist at the time of the original taking to constitute larceny, the wrongful taking being all the while continuous.

It is to be observed that this principle does not apply in cases where the owner parted with his property, and not the possession merely, as in the case of a sale procured by fraud or false pretenses. In such instances, there is no larceny, however gross the fraud by which the property was obtained. *Mowrey v. Wash*, 8 Cow. 238; *Ross v. People*, 5 Hill 294. "It is difficult to distinguish such a case from larceny," remarks Mr. Justice Cowen in *Ross v. People*, *supra*, "and were the question *res nova* in this court, I, for one, would follow the decision in *Rex v. Campbell*, 1 Moody C. C. 179. The decisions, however, are the other way, even in England, with the single exception of that case, and they have long been followed here. There is nothing so palpably absurd in this as to warrant our overruling them."

We are unable to discover any error in the instructions of the presiding judge.

Exceptions overruled. Judgment for the state.

Kent, Walton, Barrows, Danforth, and Tapley, JJ., concurred.²³

WILSON v. STATE.

1910. SUPREME COURT OF ARKANSAS. 96 Ark. 148,
131 S. W. 336.

MCCULLOCH, C. J.²⁴—Appellant was convicted of the crime of grand larceny, in stealing a bull alleged to be the property of one Chapman. He took the bull from the range, claiming it to be his own, which had strayed away, and kept it several months in his son's pasture. Chapman heard of the bull being in his pasture, and laid claim to it; but appellant refused to give it up. Appellant afterwards sold it to a butcher, who killed it, and this prosecution was begun against the appellant for stealing the bull.

²³ Accord: *Commonwealth v. White*, 11 Cush. (Mass.) 483; *Reg. v. Riley*, 6 Cox Cr. C. 88.

²⁴ Arguments of counsel are omitted.

At the trial of the case, appellant and Chapman both introduced testimony tending to establish their respective claims of ownership. The testimony was sufficient to have warranted a finding of the jury either way on that issue, and also that the appellant took the bull from the range and afterwards converted it to his own use under an honest belief that it was his own property. The court gave, over appellant's objection, the following instruction, No. 6: "If he took it honestly, believing it was his, and learning afterwards that it was not his property, and converted it to his own use with the felonious intent to deprive the owner of it, when he knew it was not his own property, he would be guilty."

If a person takes property in good faith, under an honest belief that he is the owner, it does not constitute larceny, for the felonious intent is lacking. The felonious intent must, in order to constitute larceny, exist at the time of the taking; and a subsequent formation of such an intent is not sufficient. So, if the taking is under an honest belief of ownership, there being no felonious intent to steal at that time, the fact that such an intent is formed after ascertaining that another person is the true owner does not make it larceny. *Rapalje on Larceny and Kindred Offenses*, § 23; *People v. Miller*, 4 Utah 410, 11 Pac. 514; *Beckham v. State*, 100 Ala. 15, 14 So. 859; *Beatty v. State*, 61 Miss. 18; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Lamb v. State*, 40 Neb. 312, 58 N. W. 963.

By some courts it has been held that, if the original taking was a trespass, followed subsequently by a wrongful conversion of the thing taken, the intent to steal need not, in order to make it larceny, have existed at the time of taking, because, in contemplation of law, as it is said, "a tortious taking does not divest the possession of the owner, but subsequent conversion by the taker has such effect, and will therefore constitute larceny when accompanied by a felonious intent." Conceding this to be the correct rule, it can not be extended so as to apply to one who took property in good faith, under an honest belief of ownership, for in this there is no element of a willful trespass, even though there be a subsequent conversion with knowledge of the true ownership.

It follows, therefore, that the court erred in its instruction, and for this reason the judgment should be reversed, and the cause remanded for new trial. It is so ordered.

JOHNSON v. PEOPLE.

1885. SUPREME COURT OF ILLINOIS. 113 Ill. 99.

Mr. Justice Mulkey delivered the opinion of the court:²⁵

At the November term, 1883, of the Johnson County Circuit Court,

²⁵ Arguments of counsel, and part of the opinion are omitted.

John T. Johnson was convicted, and sentenced to the penitentiary for two years, for the larceny of five twenty-dollar gold pieces, the property of one Charles Grattan. The present writ of error is brought to reverse that conviction.

The evidence tends to show the money charged to have been stolen was voluntarily delivered by the owner to the accused for safe keeping, the former being on a spree, and considerably intoxicated at the time. The indictment under which the conviction was had was in the ordinary form, charging the defendant with a common-law larceny, merely. * * *

Larceny, by the common law, is defined to be "the felonious taking and carrying away of the personal goods or property of another." From this definition it follows that every larceny necessarily includes a trespass,²⁶ for a trespass to personal property is nothing more than the unlawful and forcible taking of the goods of another without such felonious intent; and as trespass is an injury to the possession only, it logically and legally follows that no one in the lawful possession of goods can commit a larceny of them, for it were idle and absurd to talk of one committing an injury to his own possession—and such is the well settled doctrine of the common law. One, however, may have the actual custody of goods, and yet not have the possession. Thus goods on the premises of the owner, to be used by himself and family, including his servants, are always to be deemed in the possession of the owner, although the ordinary duties of the servants and other members of the household require them, from time to time, to handle, occupy or use them, or even to sell or dispose of them to others. So where chairs, beds, etc., are occupied by a guest, whether in a hotel or in a private family, or where plates or other articles are used by one at the table of another, or where the owner delivers a chattel to another to be examined or used for some temporary purpose in the presence of the owner, the same rule applies. In all these cases, and in all others analogous in principle, the possession remains with the owner, and those having the temporary use or occupancy of the property are deemed, in law, to have the mere custody of it, as contradistinguished from the possession. But where the owner of a chattel delivers it to one, other than to a mere servant, in trust, upon a contract, express or implied, that the latter will faithfully execute the trust, the rule is different. In such case, which is one of ordinary bailment, the possession as well as the custody of the chattel passes to the bailee with its delivery; and it follows from what we have said, while the contract of bailment subsists, the bailee can not, by the common law, commit a larceny of the chattel. Such is

²⁶ Accord: Recent decisions holding that larceny involves a trespass; *Cohoe v. State*, 79 Nebr. 811, 113 N. W. 532; *People v. Hoban*, '240 Ill. 303, 88 N. E. 806, 22 L. R. A. (N. S.) 1132n, 16 Ann. Cas. 226.

undoubtedly the common-law rule with respect to larceny by bailees. It is to be borne in mind, however, that in all cases where this rule is properly applicable, the delivery of the property must have been fairly and honestly obtained, otherwise the legal possession will remain with the owner, notwithstanding the delivery. In such case the apparent contract of bailment is, at the election of the bailor, in contemplation of law really no contract at all, by reason of the fraud, for it is a familiar principle that fraud vitiates whatever it enters into. On this principle, whenever there is an original purpose on the part of the bailee to steal the property, and the bailment is a mere pretence on his part to hide a felonious intent, the possession will not pass; and if the property is subsequently converted, in pursuance of such criminal purpose, it will be larceny by the common law. But even in cases where the contract of bailment is valid, and the possession has passed to the bailee, if the latter is guilty of any tortious act in respect to the subject of bailment, whereby the contract is terminated, the possession will result to the bailor, although the actual custody of the property bailed remains in the bailee; and if the latter, after the contract has been thus terminated, appropriates it to his own use with intent to steal it, he will be guilty of larceny at the common law. Thus, where a carrier of goods broke a package, and fraudulently converted a part of them, it was held to be larceny. So where one to whom was handed a letter containing money, to be carried to the post office, broke it open on the way, and afterwards converted the money, it was held the same way. The tortious acts of breaking the package in the one case, and the breaking open the letter in the other, severally terminated the contracts of bailment, and the legal possession resulted to the respective owners.

From this review of the subject it will be perceived there are three classes of cases in which convictions for larceny at common law are sustained where the apparent possession is in the accused: First, where the accused has the mere custody of the property, as contradistinguished from possession, as in the case of servants and the like; second, where he obtains the custody and apparent possession by means of fraud, or with a present purpose to steal the property; and third, where one having acquired possession by a valid contract of bailment, which is subsequently terminated by some tortious act of the bailee, or otherwise, whereby the possession reverts to the owner, leaving the custody, merely, in the former, and the bailee, while being thus a mere custodian, feloniously converts the property to his own use. But in all these cases the legal possession is in the owner at the time of the felonious conversion, the accused, in contemplation of law, being regarded as a mere custodian of the property. It is to be further noted, that in those cases where the contract of bailment has been induced by the fraud of the ac-

cused, and convictions are permitted on that ground, the owner does not, either in fact or in law, part or intend to part with the property itself, and the constructive possession which he has of it by reason of his general ownership, is held to be superior to a *quasi* possession or custody acquired by mere fraud or other wrongful act. But where the owner intends to part both with the title and possession, and the property is delivered in pursuance of such intention, the person receiving it can not be convicted of larceny, although the transfer was induced by the fraud of the latter and with a purpose to steal the property. In these cases the title actually passes, subject to the right of the owner to reclaim the property on account of the fraud, and thus reinvest himself with the title; but until he does this, both the title and possession are in the fraudulent vendee, and hence the latter can not be convicted of a larceny of it. The general doctrines of the common law in respect to larceny, as affected by the possession of the property, will be found, upon an examination of the following authorities, to be substantially as stated above. 2 Archbold's Crim. Proc. & Plead. 442; 2 Wharton on Crim. Law, §§ 1840, 1843; Rex v. Bazely, 2 East's P. C. 571; Bull's Case, *id.* 572; Lavender's Case, *id.* 566; Rex. v. Mucklow, 1 Moore 160; 2 East's P. C. 692; Baxter v. People, 3 Gilm. 368; Welsh v. People, 17 Ill. 339; Stinson v. People, 43 *id.* 399; Zschocke v. People, 62 *id.* 127; Phelps v. People, 55 *id.* 334.

As a bailee is one who has the possession and a qualified property in goods or other personal property under a contract with the owner, either express or implied, it follows from what we have said, and the authorities just cited, that he can not commit a larceny of the subject of the bailment so long as the contract under which he holds the same is subsisting; but when the contract by any means terminates, he, of course, ceases to be a bailee, and the possession, as we have already seen, results to the owner, although the bare custody may still remain with the bailee. In short, as we have heretofore seen, a bailee can not, at the common law, commit a larceny of the subject of bailment, for the reason the possession is in the bailee. Under the 170th section of the Criminal Code, however, a bailee may commit a statutory larceny of the subject of bailment, notwithstanding the possession is in the bailee. Indeed, by the very terms of the act a bailee in possession alone can commit the statutory offence, for there can be no such a thing as a bailee out of possession. The effect of the statute therefore is to make that a crime which before the act was a mere breach of trust.

The question then recurs, assuming the defendant to be guilty, does the evidence tend to show he is guilty of the statutory offence? Of this there is absolutely no doubt.

The prisoner swears positively the money was given to him by

Grattan for safekeeping, and in this statement he is certainly somewhat corroborated by others. This, of course, assuming it to be true, constituted a bailment of the money, and, assuming the contract of bailment to have continued in force until the time of conversion (and there is nothing in the evidence showing the contrary), it afforded a complete answer to the common-law indictment. * * * The accused not being charged with the statutory offence, it is therefore clear he can not, under the present indictment, be convicted of it.

Judgment reversed.

MITCHUM v. STATE.

1871. SUPREME COURT OF ALABAMA. 45 Ala. 29.

B. F. SAFFOLD, J.²⁷—The defendant was indicted for petit larceny. On the trial the evidence material to the exception taken by him was that the box of matches, the subject of the larceny, was placed on the counter of the store to be used by the public in lighting their pipes and cigars in the room, and for their accommodation, and was taken therefrom by the defendant. The court was requested by the prisoner to charge the jury that if the matches were placed on the counter of the store house for the use of customers, or the public, and they were taken while there for such use, the defendant was not guilty. The charge was refused, and the defendant excepted.

Larceny may be committed of property under the circumstances attached to the box of matches. The owner had not abandoned his right to them. They could only be appropriated in a particular manner and in a very limited quantity, with his consent. Taking them by the box full without felonious intent would have been a trespass, and with it, a larceny. The ownership was sufficiently proved.

The judgment is affirmed.

(b) Possession Obtained Fraudulently or Larceny by Trick.

“If a person obtain the goods of another by a lawful delivery without fraud, although he afterwards convert them to his own use, he can not be guilty of felony. As if a tailor have cloth delivered to him to make clothes with; or a carrier receive goods to carry to a certain place; or a friend be entrusted with property to keep for the owner’s use; which they afterwards severally em-

²⁷ Argument of counsel is omitted.

bezzle. So if plate be delivered to a goldsmith to work or to weigh, or as a deposit, his conversion of it will not be felony. But if such delivery be obtained by any fraud or falsehood, and with an intent to steal, though under pretense of a hiring, or even a purchase, if in the latter case no credit were intended to be given, the delivery in fact by the owner will not pass the legal possession so as to save the party from the guilt of felony. But if the property were intended to pass by the delivery, there can be no felonious taking." 2 East P. C., § 113.

REX v. SEMPLÉ.

1786. OLD BAILEY. 1 Leach C. C. (4th ed.) 420.

* * * At the ensuing session the prisoner was again indicted for the same offense [larceny] before Mr. Serjeant Adair, Recorder; present Mr. Justice Gould and Mr. Rose, D. R.

The following facts appeared in evidence: The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighborhood, and had frequently hired chaises from the prosecutor, as the occasion required, and for which he had always paid with great punctuality. On the first of September, 1785, the prisoner hired a post-chaise of the prosecutor, saying that he would want it for three weeks or a month, as he was going a tour around the north. It was agreed that the prisoner should pay at the rate of five shillings a day during the time that he kept the chaise; and a price of fifty guineas was talked about in case he should determine to purchase the chaise on his return to London, but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner fetched the chaise from Mr. Lycett's with his own horses; and it was in evidence that he was driven in it from London to the Crown and Cushion at Uxbridge, where he ordered a pair of horses and went from thence to the Duke of Portland's, and returned. He took fresh horses at the Crown and Cushion, but where he went with the chaise afterwards did not appear. The fact was, he never returned it to Mr. Lycett; nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by the activity of Mr. Feltham, in Fleet-street, upon a suspicion of having, under false pretences, defrauded him of a quantity of ladies' hats.

The counsel for the prisoner submitted to the court that, admitting the whole of the evidence to be true, the offense did not amount to felony; and they endeavoured to distinguish it from *The King v. Pear*, and *Aickles' Case*, inasmuch as in those

cases the parties had never obtained the legal possession of the property delivered to them; but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was not hired for any definite length of time, or to go to any certain place; and the mere understanding that it was for three weeks or a month, for the purpose of making a tour round the north, made no part of the contract. He had hired it for such a length of time as he should please to keep it, at a certain stipulated price for each day; and it being delivered to him upon these terms, he had the entire possession of it in himself, and was answerable in damages for its detention, or for any injury which might happen to it during his absence. But supposing the contract should be thought not to extend beyond the three weeks or a month, it is clear that during that time he had at least the legal possession; and then no intention to convert it wrongfully to his own use arising afterward, whether from necessity or dishonesty, will make the withholding it felony; for the *animus furandi* must exist at the time the property is obtained. In all the leading cases upon this subject of constructive felony there has always been some evidence of a tortious conversion; but in this case it has not been proved that the prisoner has disposed of the chaise; it may be at this very moment in his possession, for anything that appears to the contrary, and a conversion can not be inferred from his having neglected to return it.²⁸

THE COURT.—The court is bound by the determination of former cases. It is now settled that the question of intention is for the consideration of the jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of *Pear's Case*, and the other decisions which the judges have made upon the subject of constructive felony. If there was a *bona fide* hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it can not be felony, whether the time for which it was hired be limited or indefinite; for by the *bona fide* contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it; and therefore, although he afterwards abused that trust and that possession, felony could not ensue, because the original taking was lawful. But, on the other hand, if the hiring was only a pretence made use of to get the chaise out of the possession of the owner, without any intention to restore it, or to pay for it, in that case, the law supposes the possession still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent conversion will be felony. The case of *The King v. Pear* was very solemnly debated at *Ld. Ch. Justice De Grey's house*; and the unanimous

²⁸ Part of the statement of facts is omitted.

opinion of the judges was at last that the direction given to the jury by the learned judge who tried the prisoner was right. The most important part of the argument turned upon the consideration, whether the delivery of the horse to Pear had in law divested the owner either of his property or the possession of it. The question left with the jury was, whether the contract was meant fairly, or, whether it was mere colour and pretence. The jury found that it was a mere colour and pretence; and upon that finding the judges determined the taking to be felony; because it is an established principle of law that the possession of property can not be obtained through the medium of a fraud. But it has been attempted to distinguish the present case from *The King v. Pear*. First, That the hiring in this case was indefinite, but that in *The King v. Pear* it was certain and limited. The time can not be material in questions of this nature. Pear hired the horse in the morning, under pretence of going to Sutton in Surrey, and to return in the evening; but as the hiring was found to be felonious, the law of the case must have been the same, although it had appeared that the hiring was for two days, a week, a month, or any other given time; nay, if the time had been left entirely unlimited. The circumstance of the time being long or unsettled may indeed render the proof of guilt more difficult, but can not alter the law of the case. Secondly, It is said that this case differs from the *King v. Pear* because it was proved that Pear had sold the horse, and therefore had converted it to his own use; but that in the present case no proof has been given that the prisoner has sold or otherwise converted the chaise. Proof of actual conversion certainly is not necessary, but the jury must judge of it from the circumstances of the case. If the prisoner, at any time before the prosecution was commenced, had offered to restore the chaise to the owner, or to pay him for it, such a conduct would have been evidence of an honest intention, when he originally hired it, and would have reprobated the idea of a fraudulent design. But he hires the chaise for a month, and a year passes, and neither the chaise nor the man are heard of till he is taken. There is no evidence even at this moment that the chaise is forthcoming, nor does any one pretend to know where it is. This, therefore, raises a presumption against the prisoner which it is incumbent on him to repel; and if he can not, it will be for the consideration of the jury, under all the circumstances of the case, whether they think he has feloniously disposed of it, or otherwise converted it to his own use. In their determination of this point they must recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the redelivery of the chaise formed any part of the contract, the nondelivery of it must necessarily form a part of their consideration. They will then consider whether the nonde-

livery is sufficient evidence to satisfy their consciences that he has converted it to his own use. These two considerations will naturally lead to a third, viz.: Whether the property thus converted was originally obtained with a felonious design, which will carry them back to the instant of time that he obtained possession of it; and if they should find the original hiring was felonious, the most ingenious subtlety can not distinguish this case from that of *The King v. Pear*. There is a case in *Kelynge* of a person who took a lodging in a house, and afterwards at night, while the people were at prayers, robbed them. The jury found that the intention of taking the lodging was to commit the felony; and the judges determined that this was burglary. There was also a case determined very lately by the judges. A man ordered a pair of candlesticks from a silversmith to be sent to his lodgings. They were sent to his lodgings, with a bill of parcels; but he contrived to send the servant back, and to keep the goods; and this was held to be felony, although they were delivered with the bill of parcels, and under an expectation of being paid the money; for the jury found that it was a pretence to purchase with intention to steal.

The question of original intention was left with the jury; and they found the prisoner guilty. A motion was made in arrest of judgment; but it was overruled, and he received sentence of transportation for seven years.²⁹

PEOPLE v. MILLER.

1902. COURT OF APPEALS OF NEW YORK. 169 N. Y. 339,
62 N. E. 418, 88 Am. St. 546.

O'BRIEN, J.³⁰—The defendant was convicted of the crime of grand larceny and sentenced to imprisonment in the state prison for ten years, but upon appeal the court below has reversed the judgment of conviction and granted a new trial, and the People have appealed to this court from that order. * * *

The indictment charged the defendant with grand larceny in two counts. The first count charged the defendant with a felonious appropriation to his own use of one thousand dollars in money which he then and there had in his possession, custody and control, as bailee, servant, attorney, agent, clerk and trustee of the complainant. This charge was abandoned on the trial and no further reference need be made to this count in the indictment. The second count charges the defendant with larceny in the common-law form, namely, that "on the sixteenth day of November, in the year

²⁹ Accord: See cases in 25 Cyc., p. 40, n. 75.

³⁰ Arguments of counsel, and part of the opinion are omitted.

of our Lord one thousand eight hundred and ninety-nine, at the borough and in the county aforesaid, with force and arms, one thousand dollars in the money and lawful currency of the United States of the value of one thousand dollars of the goods and chattels and property of one Catherine Moser, then and there being found, feloniously did steal, take and carry away, to the great damage of the said Catherine Moser, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity." * * *

The evidence at the trial to prove the offense charged took a wide range and covered a broad field of inquiry, and although it related to only about eight months of the defendant's career, there is little, if any, dispute about the facts. * * * His plan was first put into operation in a very simple way in March, 1899, when he announced that he possessed such means of obtaining inside information of great money-making operations in the New York Stock Exchange and the exchanges in other cities that he was able to make and pay large profits to parties who would deposit money with him. The scheme proposed to depositors by defendant was that for every ten dollars or more deposited with him he would pay ten per cent. weekly until the deposit was withdrawn. The depositor was to be guaranteed against loss by what he called surplus and the deposit could be withdrawn at any time upon a notice of one week. He represented himself as the manager of what is styled the "Franklin Syndicate," and all his advertisements, circulars and receipts had upon their face a picture or portrait of Dr. Franklin, under which was printed one of the apothegms attributed to that eminent philosopher, namely: "The way to wealth is as plain as the road to market." At first he carried on his operations in a candy store, where he met such persons as he was able to persuade to invest, but as soon as the project had fairly started he engaged the top floor of a two-story frame house in a residential district. This place for the conduct of his operations is described by one of the witnesses as a small hall room with three chairs, a small table, a desk and a safe. He paid the promised weekly dividend promptly and the allurements of such enormous profits made every depositor a missionary to propagate the new theory by means of which wealth could be easily and speedily attained. The scheme, of course, could not succeed without a constant accession of new depositors, and they came. The project grew and expanded with amazing rapidity. The wildest dreams that the defendant could possibly have entertained were more than realized. In the month of October following the commencement of his operations, he was obliged to rent the whole house, and there he established a correspondence and literary bureau under the management of a person who understood the way to reach the public

through the public press, as well as by attractive advertisements, circulars and other publications that were scattered broadcast throughout the city, the country, and were sent even to foreign lands. Immense sums of money were expended in purchasing space in the public press, and even in financial periodicals, announcing the amazing success of the project. The public throughout the country read and believed, a striking proof of the extent to which men may be influenced in their pecuniary interests by the organs of public opinion. When the checks for dividends were sent out to the depositors they were always accompanied by circulars or newspapers containing highly colored descriptions of the astonishing success of what was called the "Syndicate." In October and November the scheme had reached its highest development. The house was filled with clerks, all working from nine in the morning until ten at night, drawing dividend checks, receiving money and sending out circulars and newspapers. The streets were daily crowded with depositors; two lines were daily formed, one of depositors and the other to draw dividends, and, of course, the depositors were encouraged by the success of their neighbors who were receiving such enormous rewards. Money was piled in heaps about the place, upon the counter and the floor. People remained in line for hours awaiting their turn to reach the house to deposit their money. The crush was so great, as the proof tended to show, that the stoop broke down and a new one had to be erected. Money was received to the amount of over sixty thousand dollars on some days. The mail brought from all parts of the country, daily, hundreds of letters containing deposits, and twenty or more clerks were employed writing dividend checks, the defendant's name being attached by means of a rubber stamp. On some days the dividends paid out amounted to as much as thirteen thousand dollars. No books were kept and no stocks or collateral were ever seen. The place had no telephone or any of the furnishings of an ordinary office. At one time highly colored advertisements were inserted in six or seven hundred papers throughout the United States, for which the defendant paid over twenty thousand dollars. The character of these advertisements need not be stated. It is sufficient to say that they were so framed as to attract the ignorant and credulous. About the twenty-fourth of November, 1899, a little more than eight months from the time that the scheme was first put into execution, the defendant had received over one million dollars in deposits from over twelve thousand depositors throughout the United States, Canada and there were even a few from Europe. He had paid out large sums of money in dividends, as that was an essential part of the scheme; but he had been so successful in reaching the ear of the public that he had on hand large sums of money. On the date last mentioned he closed the concern, made a general assignment for the

benefit of creditors, and fled to Canada, taking with him one hundred thousand dollars in United States bonds, which he had just purchased, and the proceeds of a bank certificate of deposit for the same amount, which he procured to be cashed. This, in brief, is the history of defendant's operations, and although they savor more of romance than reality, the facts were established at the trial by incontestable proof. The defendant never, in fact, had any connection with the stock exchange, and did not purchase or deal in securities of any kind. He had, in fact, no business except the preparation and distribution of circulars and advertisements, the receipt of money from the various depositors and the distribution of the so-called dividends. The whole project from beginning to end was a transparent swindle.

The complainant in this case was one of the persons induced to become a depositor by the flattering promise of large dividends which the defendant held out to the public through the press and otherwise. On the twelfth of October, 1899, she deposited one hundred dollars and received a weekly dividend of ten dollars until about the time that the concern collapsed. On the sixteenth of November she was induced to deposit with the defendant the one thousand dollars mentioned in the indictment. She received a receipt therefor, which was numbered 12,217. The receipt on its face purported to give her an interest in the Franklin Syndicate. It stated that the principal was guaranteed against loss by surplus, and that it could be withdrawn at any time upon one week's notice and the return of the receipt, and that ten per cent. would be paid weekly on the deposit until the principal was withdrawn. The circumstances under which she delivered the money to the defendant will appear from her own statement of the transaction: "After reaching the place where Miller was sitting I gave him my thousand dollars. This thousand dollars was in United States currency; it was in bills. I do not wish to mention where I got the thousand dollars from. I asked him if he would insure the money against loss, and he said the coupon was insurance enough. By the coupon he referred to the paper which he gave me. * * * No person acting for the defendant asked me to put in the thousand dollars. I conceived the idea myself that it would be a good thing to put in a thousand dollars and receive a hundred dollars a week interest. * * * There was no representation made to me from the Syndicate, but I read something in the papers somewhere, I do not know where, that Vanderbilt, Gould and all of them made money in Wall street. I knew this was true and I thought this money was to be used for the same purpose and I would get the benefit of it."

There can be no doubt that the complainant delivered the money to the defendant for the purpose of speculation, with the understanding that the deposit should be returned with the accumulated

profits, and had the defendant actually used the money in speculation, however improvident or reckless, and lost, his act would not amount to larceny. But it is plain that he never intended to use the money in speculation. The sole purpose of the pretense and device referred to was to enable him to get possession of the money of others and to appropriate it to his own use. The jury could have so found, and their verdict imports such a finding. The jury were authorized to find and by their verdict have found that the complainant did not intend to part with the title or the possession of the money, but merely to give the defendant the custody of it for the purposes specified. It was competent for them to find that the complainant did not intend to part with her title to the money to the defendant, and while she may have intended that he could give title to it to some third person, in order to engage in speculation, yet, as nothing of that kind actually happened, or was intended on the part of the defendant, that consideration is of no importance. The real question is whether, upon any view of the evidence which the jury was authorized to take, the defendant could be convicted of larceny as that offense was known at common law. If so, then the verdict should be sustained.

Larceny, as defined by § 528 of the Penal Code, embraces every act which was larceny at common law, besides other offenses which were formerly indictable as false pretenses or embezzlement. The offense of larceny at common law is established by proof on the part of the prosecution showing that the defendant obtained possession of the property by some trick, fraudulent device or artifice, *animo furandi*, with the intention at the time of subsequently appropriating it to his own use. This proposition is well sustained by authority in this and other courts, both before and since the enactment of the Penal Code. (People v. Laurence, 137 N. Y. 517; People v. Morse, 99 N. Y. 662; Justices, etc., v. People ex rel. Henderson, 90 N. Y. 12; Loomis v. People, 67 N. Y. 322; Hildebrand v. People, 56 N. Y. 394; Smith v. People, 53 N. Y. 111; People v. McDonald, 43 N. Y. 61; Com. v. Barry, 124 Mass. 325; Reg. v. Buckmaster, 16 Cox C. C. 339.) We think that the jury could find upon the proofs of this case, and must be deemed to have found by their verdict, that the defendant received the money in question by means of a trick, device or artifice, with the intention at the time of appropriating it to his own use. The manner in which the defendant obtained possession of the money was none the less a fraudulent device, trick or artifice because his operations were conducted upon a large scale and assumed some of the forms of business. It was plainly intended from the beginning and at every stage of the defendant's operations to get possession of the money of others by means of fraudulent devices and then appropriate it to his own use. This was larceny at common law and is still larceny under the

Penal Code. The cases cited above sustain this proposition and differ in no essential respect from the case at bar.

The learned counsel for the defendant contends that the proof in this case established no criminal offense other than obtaining money by fraudulent pretenses, and since that offense was not stated in the indictment the defendant was improperly convicted, and such was evidently the view of the majority of the learned court below. It is very doubtful, however, if such a charge could be sustained by the proof in this case. False pretenses, as understood in the criminal law, as a means of obtaining the title or possession of money or personal property, imports an intentional false statement concerning a material matter of fact upon which the complainant relied in parting with the property or in delivering the possession. It would be difficult to show that the defendant in this case made any material false statement concerning any existing fact. His statements were all promissory in nature and character. He represented to the public very little, if anything, concerning any fact existing at the time. His statements consisted in persuading the depositors that he could and would obtain for the use of their money large profits in the form of dividends. These statements were all in the nature of promises, and although they were very effective in producing the result desired by the defendant, they would hardly constitute the basis for a criminal charge of obtaining money by false pretenses. (*Ranney v. People*, 22 N. Y. 413; *People v. Blanchard*, 90 N. Y. 314; *People v. Baker*, 96 N. Y. 340, 348; *Therasson v. People*, 82 N. Y. 238.) Under these authorities it would be very difficult to frame an indictment against the defendant for obtaining money by false pretenses, or to sustain it by proof at the trial. The distinction between larceny, false pretenses, and embezzlement was concisely stated in the brief opinion of the court in *Commonwealth v. Barry* (*supra*). "If a person honestly receives the possession of the goods, chattels or money of another upon any trust, express or implied, and, after receiving them, fraudulently converts them to his own use, he may be guilty of the crime of embezzlement, but can not be of that of larceny, except as embezzlement is by statute made larceny. If the possession of such property is obtained by fraud, and the owner of it intends to part with his title as well as his possession, the offense is that of obtaining property by false pretenses, provided the means by which they are acquired are such as in law are false pretenses. If the possession is fraudulently obtained, with intent on the part of the person obtaining it, at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny." In this case the complainant's money was not obtained by the defendant by such means or representations as in the criminal law constitute

false pretenses. But the jury could have found that he did obtain the money by means of a fraudulent device, with the intent on his part at the time he received it to convert it to his own use; and also that the complainant intended to part with her possession merely and not with the title, and so the verdict convicting the defendant of larceny was warranted by the evidence.

The case of *People v. Dumar*, 106 N. Y. 502, does not support the contention of the learned counsel for the defendant that the proof in this case was not sufficient to warrant a conviction for larceny. It was held in that case that the charge of larceny in the common-law form could not be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations. It will be seen that in that case there was false representation concerning a material fact upon which the person parting with the property relied, and, hence, the real offense was false pretenses and not larceny as it was understood at common law. The defendant in that case could have been indicted for false pretenses, since the false statements related to facts and were not as here promissory in their character. The case at bar can not be distinguished in any essential respect from that of *People v. Laurence* (*supra*). The only distinction that can be made is that the complainant in the case referred to, when parting with the cars, could not have intended to part with the title, but on the contrary it intended that the identical cars should be returned when the necessary changes were made. But in the case at bar the thing delivered to the defendant was money, which has no ear-mark. It lost its identity when delivered to the defendant, and the complainant of course could not have intended that the identical bills which were delivered to the defendant should be returned to her. The difference in the two cases, if any, is founded entirely upon the different character of the property which the accused obtained. That distinction would not seem to be material. The defendant in that case, as in this, got possession of the property by means of a false pretense or fraudulent device promissory in character, and, therefore, not amounting to the crime of false pretenses or embezzlement, but since in both cases his intent at the time was to appropriate the thing to his own use it was common-law larceny. In both cases the fraudulent device consisted in deceiving the owner of the property, not as to any existing fact, but with respect to intentions as to future operations with the property. The fact that in the case referred to the thing stolen was a car and in this case money can make no difference, since the owner in both cases parted with the property and the accused obtained it under circumstances essentially the same. The offense which the defendant was guilty of was larceny rather than false pretenses or embezzlement, since he procured the money by operating

upon the minds of depositors by promises of large profits as a fraudulent device to get possession of the money and there was no agency, bailment or trust to give any color of right to his original possession. Moreover, the same act may sometimes amount to larceny at common law and embezzlement under the statute, and when it does the offender may be prosecuted upon either charge, at the option of the People, when the two offenses are of the same grade and do not require a different measure of punishment. (2 Bishop's Cr. Law [7th ed.], §§ 328, 329 and notes.) We are, therefore, of the opinion that the evidence was sufficient to submit to the jury on the charge of larceny and that it sustains the verdict.

The distinction between larceny and false pretenses is well illustrated by the case of *Zink v. People* (77 N. Y. 114). In that case it was held, after a most thorough discussion of the authorities, that the offense committed by the accused was false pretenses and not larceny. The reasons for that conclusion are very plain and obvious. The accused was indicted and convicted for selling a large quantity of malt which had been shipped to him in New York from Ohio. The property was accompanied by a bill of lading, which was delivered to the accused, and vested in him the legal title and possession of the property. The shipper intended to vest the consignee with the title so as to enable him to sell the property and account for the proceeds. Beyond all doubt the owner in that case intended to part and did part with the legal title and possession of the property. The accused intended to acquire the title and possession, otherwise the transaction which contemplated a sale and delivery of the malt to third parties could not have been effectuated at all. The legal title and possession of the property having passed to the accused he could not, of course, have been guilty of larceny, although the transaction in the first instance might have been induced by false representations. But the case at bar presents an entirely different transaction. The complainant did nothing except to deliver the money to the defendant. She did not intend to loan it to him or to vest him with the title, but with the custody only, and that for a specific purpose. It was very much like the transaction in the *Morse Case* (*supra*), where the money deposited was to be returned, and where its appropriation by the custodian to her own use was held to be larceny. The complainant in the case at bar undoubtedly intended to part with the manual possession of the money, but even that purpose and intention on her part was the result of a trick or fraudulent device on the part of the defendant. Her consent to part with the manual possession of the money having been procured by the defendant's fraudulent device, it was in law no consent at all. The fact that the plaintiff was led to believe that the defendant was the manager of a syndicate or corporation only emphasizes the nature and character of the device,

since there was in fact neither a corporation nor a syndicate, but the defendant was conducting the operations as an individual under color of names and titles intended only to deceive. I have not been able to find any case of controlling authority where it was held that the transaction amounted to false pretenses on the part of the accused as distinguished from common-law larceny, that is not readily distinguishable from the case at bar upon the facts. * * *

Our conclusion, therefore, is that the order of the Appellate Division should be reversed and the judgment of conviction affirmed.

Parker, Ch. J., Gray, Haight, Landon, Cullen and Werner, JJ., concur.

Ordered accordingly.³¹

³¹ In the court below (64 App. Div. 450), where the conviction was reversed, Hirschberg, J., says at pages 453-458: Larceny at common law was accomplished by either trespass or trick. That the property or money was voluntarily delivered or paid over to the thief was no defense provided the delivery or payment, if not effected by trespass, was the result of a device practiced with the intent to steal, and the complainant did not part or intend to part with the title to the property. The latter element was essential, for if by any swindling trick or device the victim could be induced to part with the title voluntarily, absolutely and not conditionally, the crime was other than larceny. Wharton, in his work on Criminal Law (9th ed., § 964), states the rule as follows: "At common law the principle is that where the owner retains the property of the goods in himself, and only parts with the possession, he may maintain larceny against the person who *animo furandi* obtains from him such possession and then converts the goods. * * * The same rule applies to all cases of bare possession obtained by trick or fraud. * * * § 965. If, however, the property in the goods is passed, not conditionally but absolutely, then at common law * * * a prosecution for larceny must fail." Bishop, in his work on Criminal Law (vol. 1 [7th ed.], § 583), states: "If one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him under the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat. But if, with the like intent, he fraudulently gets leave to take the possession only, and takes and converts the whole to himself, he becomes guilty of larceny; because, while his intent is thus to appropriate the property, the consent which he fraudulently obtained, covers no more than the possession."

The distinction is elementary and has been repeatedly pointed out by the courts in this state. In *Smith v. People* (53 N. Y. 111) it is stated in the head note as follows: "If by a trick or artifice the owner of property is induced to part with the custody or naked possession for a special purpose to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking is larceny; but if the owner part not only with the possession, but the right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods under false pretenses." In *Loomis v. People* (67 N. Y. 322) the court said (p. 329): "There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretenses. The distinction is a very nice one, but still

very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. In the former case, where by fraud, conspiracy or artifice the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established. While in the latter, where title as well as possession is absolutely parted with, the crime is false pretenses. It will be observed that the intention of the owner to part with his property is the gist and essence of the offense of larceny and the vital point upon which the crime hinges, and is to be determined." * * *

It is not always easy to apply the principle to the facts and to determine with precision where a complainant has or has not intended to part with the title to money or property. A good title, of course, can never be acquired by crime, but the intention to confer title will characterize the grade and quality of the crime by which the intention was created. In *Smith v. People* (supra), which is probably the closest case in this state, the prosecutor was induced to deliver ninety dollars to one of the prisoners to be used in a throw of dice with the latter's confederate on the assurance that if the prisoner lost he would get a five hundred-dollar check cashed at the bank and thus repay the ninety dollars. The court concluded that, although the case was on the border line, it presented a fair question for the jury to decide as to the intention of the prosecutor to part with the ownership of the money. But even in that case it is apparent that the transfer of the money to the thief was not absolute, but was wholly conditional upon his losing at the throw of the dice. If he won, the identical money was to be returned to the owner. * * * (Citation of authorities is omitted.)

Applying these cases to the facts now before us, it is difficult to see how any question can be seriously entertained as to the character of the defendant's crime. Undoubtedly influenced by his false and fraudulent representations, frequently made by means of public circulars and advertisements, although not made to her in person, Mrs. Moser was induced to voluntarily give to him the sum of \$1,000, intending to invest him with the right of using it in speculation at his own risk, although indirectly for her benefit. She paid the money to him in currency, and took back his receipt, stating that he had received it, "for an interest in the Franklin Syndicate; principal guaranteed against loss by surplus, and can be withdrawn at any time, upon one week's notice and the return of this receipt; 10 per cent. interest paid weekly on this deposit until principal is withdrawn." * * *

She intended to give the defendant her money to gamble with in his own name if he saw fit, only stipulating that she should receive the interest for the use of the money and be repaid upon demand. The money was not delivered for any special purpose, or to be used or invested in any way for her. It was to be his money; that is to say, if he lost it in Wall street or elsewhere, it was to be his loss, not hers. She did not expect that it would lie idle and intact until she should choose to reclaim it, or that in that event the identical bills would be returned to her. In other words she did not intend to invest the defendant with the mere naked custody and possession of the money for safe keeping, nor did she give it to him with either instructions or expectation that he would do any specific thing with it for her, but she gave it to him so that he might gamble with it in Wall street, if he saw fit, but whether he did or not and whether he won or not she expected interest for the use of the money, and on demand a return not of the same money but a like amount. Her consent to the use by the defendant of her money was not limited to its custody and possession, but included the right to hazard it at will. She, therefore, intended to part with title to and dominion

REGINA v. STEWART.

1845. KENT SPRING ASSIZES. 1 Cox Cr. C. 174.

The prisoners were indicted for larceny under the following circumstances: They passed for husband and wife, and, having taken a house at Tunbridge Wells, Mrs. Stewart went to the shop of the prosecutor, selected the goods in question to the amount of £10, and ordered them to be sent to her home. The prosecutor accordingly despatched the goods by one Davies, and gave him strict injunctions not to leave them without receiving the price. Davies, on arriving at the house, told the two prisoners he was instructed not to leave the goods without the money, or an equivalent. After a vain attempt on the part of K. Stewart to induce Davies to let him have the property on the promise of payment on the morrow, he, Stewart, wrote out a cheque for the amount of the bill and gave it to Davies, requesting him not to present it until the next day. It was drawn on the London Joint Stock Bank, Prince's street, London, and Davies, having left the goods, returned with the cheque to his employers. It was presented at the bank, in London, the next morning, when it was dishonored for want of effects. It was also proved that, although the prisoner had opened an account at the said bank, it had been some time before overdrawn and several of his cheques had been subsequently dishonored. * * *

JONES, SERJT., then submitted that the charge of larceny against Kidman Stewart could not be sustained. The shopman parted not only with the possession of the goods, but also with the property in them. Nor was any false representation made to him to induce him so to do. [The rest of Jones's argument, and rulings of the court are omitted.]

ALDERSON, B.—It is for you to shew that the prisoner had reasonable ground for believing that the cheque would be paid. The case seems to me to approach more nearly to *R. v. Small* (8 C. & P. 46) than to *R. v. Parker* (7 C. & P. 825). In the former, a tradesman was induced to send his goods by a servant to a place where he was met by the prisoner, who induced the servant to give him the goods in exchange for a counterfeit crown piece, and it was held to be larceny. If the owner of goods parts with the possession, he mean-

over the money. Whether the title actually passed while the defendant still retained possession of the bills is not the question. It is sufficient that she intended at the time to give him title. The defendant's crime in fraudulently inducing her to do so, by the public practice of a felonious scheme, may be larceny under the terms of the Penal Code, but as such schemes were effective in inducing her to voluntarily part with the property right in the money and not the mere temporary possession, it was not the stealing, taking and carrying away of common-law larceny as charged in the indictment.

ing to part also with the property, in consequence of a fraudulent representation of the party obtaining them, it is not larceny, but a mere cheat. But if the owner does not mean to part even with the possession, except in a certain event which does not happen, and the prisoner causes him to part with them by means of fraud, he, the owner, still not meaning to part with the property, then the case is one of larceny. Here, if the owner had himself carried the goods and parted with them as the servant did, no doubt it would have been a case of false pretenses; or if the servant had had a general authority to act, it would have been the same as though the master acted. But in this instance he had but a limited authority, which he chose to exceed. I am of opinion, as at present advised, that if the prisoner intended to get possession of these goods by giving a piece of paper, which he had no reasonable ground to believe would be of use to anybody, and that the servant had received positive instructions not to leave the articles without cash payment, the charge of larceny is made out.

(c) Distinction Between Possession and Custody.

“Also it seems generally agreed that one who has the bare charge, or the special use of goods, but not the possession of them; as a shepherd who looks after my sheep or a butler who takes care of my plate, or a servant who keeps a key to my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony, in fraudulently taking away the same; for in all these cases the offense may as properly come under the word *cepit*. 1 Hawkins P. C., ch. 33, § 6.

COMMONWEALTH v. O'MALLEY.

1867. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
97 Mass. 584.

Indictment for embezzling seven bank-bills, of the denomination and value, respectively, two of ten dollars, three of five dollars, and one each of two dollars and one dollar.

At the trial in the superior court, before Putnam, J., Bridget McDonald testified that on March 2, 1867, she was a servant in a family residing in Boston, and received from her employer, in payment of her wages, thirty-eight dollars in bank-bills; that the defendant went home with her to her employer's house that evening, and, while there asked her to lend him a dollar; that she agreed to do so, and showed him a roll of bank-bills, being those she had received during the day in payment of her wages; that he asked

her to let him take the money and count it, she not being able to read or write; and that she let him take it for that purpose; that he counted it over several times in her presence, and then, upon her asking that he should return it to her, refused to do so; that she locked the door to prevent him from leaving, but that he thereupon threatened to jump out of the window or to burn the bills, in consequence of which threat she opened the door; and that he then went off with the money. * * *

The jury returned a verdict of guilty.³²

HOAR, J.—We are of opinion that there was no evidence to sustain the indictment for embezzlement, and that the conviction was wrong. The defendant had been previously acquitted of larceny upon proof of the same facts; and it is therefore of great importance to him, if the offense committed, if any, was larceny, that it should be so charged.

To constitute the crime of embezzlement, the property which the defendant is accused of fraudulently and feloniously converting to his own use must be shown to have been entrusted to him, so that it was in his possession, and not in the possession of the owner. But the facts reported in the bill of exceptions do not show that the possession of the owner of the money was ever divested. She allowed the defendant to take it for the purpose of counting it in her presence, and taking from it a dollar, which she consented to lend him. The money is alleged to have consisted of two ten-dollar bills, three five-dollar bills, a two-dollar bill, and a one-dollar bill, amounting in all to thirty-eight dollars. The one dollar he had a right to retain, but the rest of the money he was only authorized to count in her presence and hand back to her. He had it in his hands but not in his possession, any more than he would have had possession of a chair on which she might have invited him to sit. The distinction pointed out in the instructions of the court between his getting it into his hands with a felonious intent, or forming the intent after he had taken it was therefore unimportant. The true distinction, upon principle and authority, is that stated by the cases upon the defendant's brief, that if the owner puts his property into the hands of another, to use it or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, *animo furandi*, is larceny. Thus in the *People v. Call*, 1 Denio 120, the defendant took a promissory note to indorse a payment of interest upon it, in the presence of the owner of the note, and then carried it off, and it was held that he was rightly convicted of larceny, although he might have first formed the intention of appropriating it after it was put in his hands. So where a shopman placed some clothing in the hands of a customer, but did not consent that he should take it away from the shop till he

³² Part of the statement of facts, and argument of counsel are omitted.

should have made a bargain with the owner, who was in another part of the shop, his carrying it off was held to be larceny. *Commonwealth v. Wilde*, 5 Gray, 83. See, also, *Regina v. Thompson*, 9 Cox Crim. Cas. 244; *Regina v. Janson*, 4 Cox Crim. Cas. 82. In all such cases the temporary custody for the owner's purposes, and in his presence, is only the charge or custody of an agent or servant; gives no right of control against the owner; and the owner's possession is unchanged.

Exceptions sustained.³³

COMMONWEALTH v. LANNAN.

1891. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. 629.

Indictment for the larceny of certain "promissory notes, of the amount and of the value in all of three hundred and fifteen dollars." At the trial in the Superior Court, before Barker, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

HOLMES, J.—The defendant is indicted for the larceny of promissory notes, the property of one Teeling, and has been found guilty. The case is before us on exceptions to the refusal of the court below to rule that the evidence was insufficient to support the indictment, and also to the instructions given to the jury. The evidence tended to prove the following facts: The defendant was an attorney employed by Teeling to ascertain the price of certain land. The price mentioned to him was one hundred and twenty-five dollars. He told Teeling that the lowest price was three hundred and twenty-five dollars, three hundred dollars to go to the owners of the land, fifteen to Bent, the agent, with whom the defendant communicated, and ten dollars to the defendant. Teeling assented to the terms, and gave Bent directions as to the deed. When the deed was ready, Teeling, Bent, and the defendant met. The defendant approved the deed, and said to Teeling: "Pay over the money." Teeling counted out three hundred and twenty-five dollars on the table in front of the defendant, who counted it, took it from the table, and requested Bent to go into the next room. He then gave Bent one hundred and twenty-five dollars of the money, returned to Teeling, gave him a receipt for ten dollars, and kept the rest of the money.

³³ Accord: Holding that larceny is committed where the goods are delivered for the purpose of being used, or of some act being done to them, in the owner's presence, and are then misappropriated. *People v. Johnson*, 91 Cal. 265, 27 Pac. 663; *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670; *Vaughn v. Commonwealth*, 10 Gratt. (Va.) 758.

The court instructed the jury, "that upon the evidence they might find the defendant guilty of larceny if they were satisfied that he had obtained the money of said Teeling by false, premeditated trick or device; that although Teeling might have given the manual custody of the money to the defendant, nevertheless the legal possession would remain in Teeling under such circumstances, and the larceny would be complete when the defendant, after thus getting possession of Teeling's money and inducing him to count out one hundred and ninety dollars more than was needed, appropriated it to his own use."

When the defendant took up the money from the table it had not yet passed under the dominion of Bent, who represented the opposite party. The defendant did not receive it as representing the opposite party; he purported to be acting in the interest of Teeling. The jury would have been warranted in finding that Teeling impliedly authorized the defendant to take up the money from the table, but they only could have found that he allowed him to do so for the purpose of immediately transferring the identical bills, or all but ten dollars of them, to Bent under Teeling's eyes. Subject to a single consideration, to be mentioned later, there is no doubt that in thus receiving the money for a moment the defendant purported at most to act as Teeling's servant or hand, under his immediate direction and control. Therefore not only the title to the money, but the possession of it, remained in Teeling while the money was in the defendant's custody. *Commonwealth v. O'Malley*, 97 Mass. 584. If the defendant had misappropriated the whole sum, or if he misappropriated all that was left after paying Bent, the offence would be larceny. *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767; *Regina v. Cooke*, L. R. 1 C. C. 295, 12 Cox C. C. 10. *Regina v. Thompson, Leigh & Cave*, 225, 230. 2 East P. C., ch. 16, §§ 110, 115. See, further, *Commonwealth v. Donahue*, 148 Mass. 529, 530, 12 Am. St. Rep. 591, and cases cited.

The instructions made the defendant's liability conditional upon his having obtained the money from Teeling by a premeditated trick or device. If he did so, and appropriated all that was left after paying Bent, he was guilty of larceny, irrespective of the question whether Teeling retained possession, according to the *dicta* in *Commonwealth v. Barry*, 124 Mass. 325, 327, under the generally accepted doctrine that if a party fraudulently obtains possession of goods from the owner with intent at the time to convert them to his own use, and the owner does not part with the title, the offence is larceny. Even if the possession had passed to the defendant, there can be no question that the title remained in Teeling until the money should be handed to Bent. See note to *Regina v. Thompson, Leigh & Cave* 225. 230.

In this case, however, by the terms of his agreement with Teel-

ing, the defendant had the right to retain ten dollars out of the moneys in his hand; and it may be argued that it is impossible to particularize the bills which were stolen, seeing that the defendant appropriated bills to the amount of one hundred and ninety-five dollars all at once, without distinguishing between the \$10 he had a right to select and the \$185 to which he had no right. This argument appears to have troubled some of the English judges in one case, although they avoided resting their decision on that ground. *Regina v. Thompson*, Leigh & Cave, 233, 236, 238. If the argument be sound, it might cause a failure of justice by the merest technicality. For it easily might happen that there was no false pretence in the case, and that a man who had appropriated a large fund, some small part of which he had a right to take, would escape, unless he could be held guilty of larceny. We think the answer to the argument is this: All the bills belonged to Teeling until the defendant exercised his right to appropriate ten dollars of them to his claim. He could make an appropriation only by selecting specific bills to that amount. He had no property in the whole mass while undivided. If he appropriated the bills as a whole, he stole the whole, and the fact that he might have taken ten dollars does not help him, because he did not take any ten dollars by that title, or in the only way in which he had a right to take it. The later English cases seem to admit that a man may be liable for the larceny of a sovereign given him in payment of a debt for a less amount in expectation of receiving change, as well as in cases like *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767, where there is nothing due the defendant. *Regina v. Gumble*, L. R. 2 C. C. 1; s. c. 12 Cox C. C. 248. *Regina v. Bird*, 12 Cox C. C. 257, 260. See, further, *Hildebrand v. People*, 56 N. Y. 394, 15 Am. Rep. 438.

Although the point is immaterial to the second ground of liability which we have mentioned, we may add that we are not disposed to think that the fact that the defendant may have been expected to select ten dollars for himself during the moment that the bills were in his hands was sufficient to convert his custody into possession. That right on his part was merely incidental to a different governing object, and it would be importing into a very simple transaction a complexity which does not belong there to interpret it as meaning that the defendant held the bills on his own behalf, with a lien upon them until he could withdraw his pay.

It is not argued that the averment as to promissory notes is not sustained. *Commonwealth v. Jenks*, 138 Mass. 484, 488.

Exceptions overruled.

STATE v. WALKER.

1902. SUPREME COURT OF KANSAS. 65 Kans. 92, 68 Pac. 1095.

The opinion of the court was delivered by

DOSTER, C. J.⁸⁴—This is an appeal from a judgment of conviction of grand larceny. It was charged in the information that appellant “did then and there unlawfully and feloniously steal, take, and carry away, of the personal property of one John C. Fletcher, twenty dollars, lawful money of the United States, of the value of twenty dollars, consisting of two five-dollar bills, paper currency, each of the value of five dollars, and one ten-dollar bill, paper currency, of the value of ten dollars.” The only errors complained of are the giving of a certain instruction and the refusal to give a certain other one. The one requested was as follows:

“If you find and believe, from the evidence in this case, that the prosecuting witness handed the money charged in the information herein to the defendant for the purpose of getting it changed, and that afterward the defendant retained the money and converted the same to his own use, you can not convict, but should acquit the defendant.” * * *

The instruction given was as follows:

“If you find from the evidence, beyond a reasonable doubt, that the defendant, in this county, on or about the 7th day of last August, received from said John C. Fletcher a twenty-dollar gold piece, the property of said Fletcher, for the specific purpose of changing it for said John C. Fletcher into United States currency, and then putting such money immediately into a letter to be deposited in the presence of said Fletcher in the post office at Salina, in this county, and if you further find from the evidence, beyond a reasonable doubt, that such currency was put into a letter as directed by said Fletcher, and that said letter and currency were not deposited in said post office, but that the return of said currency was demanded by said Fletcher, and if you further find from the evidence, beyond a reasonable doubt, that the defendant refused to return said currency to said Fletcher, but kept it, with intent to convert it to his own use, and to deprive said Fletcher of it permanently, then you should find the defendant guilty as charged in the information; but if you do not so find, then you should acquit the defendant.” * * *

The question, therefore, is: Did the hypothetical state of facts recited in the instruction justify the charge of guilt? The appellant contends that it did not, because, as he says, one of the elements of larceny is trespass—a wrongful taking from the owner's posses-

⁸⁴ Part of the opinion is omitted.

sion; and, as he further says, the instruction failed to condition guilt on the element of trespass, but authorized a conviction on its exact opposite, to wit, a rightful coming into possession.

It is true that larceny can not be committed except by a wrongful assumption of the possession of another's goods. However, the possession of which a thief deprives an owner does not mean, necessarily, the manual control or dominion of the property stolen. There is a difference between possession and custody. One may have what the law esteems the possession of property, while another has its custody. The hypothesis of the instruction in question presents a case of that kind. Analyzing it briefly, we observe that Fletcher gave the appellant a gold piece to be changed into paper bills, to be put by the latter into a letter to be deposited in the post office. The hypothesis was that appellant performed the first two acts but did not perform the last one, to-wit, the deposit in the post office, and, failing to do it, refused to deliver the money to Fletcher and kept it, with intent to convert it to his own use. Now, true it is that, according to the hypothesis, the bills given in exchange for the coin were never in the actual possession of Fletcher, so as to give the act of appellant the character of a physical asportation of the money, but they were in his possession in that legal sense which holds them to be the subjects of larceny. They were in his possession, held by him through the manual custody of appellant. The instruction conditions the presence together of both Fletcher and appellant at all times throughout the transaction, and conditions the continued control and authority of Fletcher over appellant in respect to everything to be done by the latter. The appellant was but a mere arm of Fletcher to accomplish the required act; or, to use another figure, he was but a mere automaton to perform according to Fletcher's will.

There are cases which hold that, when money is given by one to another to have it changed, the property in the money being surrendered by the owner, the one to whom the money is entrusted can not be convicted of stealing it, because no property was retained in it, nor can he be convicted of stealing the change, because the one claiming it never had ownership. (Whart. Cr. Law, 10th ed., § 965.) That, however, is not this case, because in this case, according to the hypothesis of the instruction, every act done by appellant was to be done, and was done, in the presence and by the present control of Fletcher. As before stated, the former had only the bare physical custody of the money. The moment the exchange of money was made the bills came into the legal possession of Fletcher by virtue of the physical dominion he was then entitled to and able to exercise. The authorities are numerous and are full

inction between that case and this is the one first suggested. There all control, power and possession was parted with, and the prisoner was intrusted with the money, and was not expected to return it. Here, as we have seen, the prosecutor retained the control and legally the possession and property. The line of distinction is a narrow one, but it is substantial and sufficiently well defined.

All concur. Judgment affirmed.³⁷

REGINA v. REYNOLDS.

1847. MONMOUTHSHIRE SPRING ASSIZES. 2 Cox Cr. C. 170.

The prisoner was indicted for larceny of a half-crown piece. It appeared that the prosecutor went into a public house, called for something to drink, and held out the half crown in his hand to pay for it. The landlord said he could not give any change. The prisoner was standing near, and offered to go out and get change, upon which the prosecutor gave him the half-crown. The prisoner went away with it, and did not return.

At the close of the case for the prosecution, Maule, J., intimated a doubt whether the facts made out a case of larceny; and after considerable deliberation, and referring to the cases collected in Greave's Russell on Crimes, vol. 2, pp. 22-44, his lordship said: "The prisoner must be acquitted. The case of Regina v. Thomas (9 C. & P. 741) is directly in point. I felt some doubt on the subject, on the ground that a party who delivers over money to another for the purpose of obtaining change, does not part with the absolute possession of it, but with the expectation of receiving change in a reasonable time, or, if change can not be obtained, then of receiving back the identical coin; but the case of Reg. v. Edwards was a precisely similar case to the present, and was decided by Mr. Justice Coleridge, after consulting with Baron Gurney, and it was there held that the prosecutor had divested himself, at the time of the taking, of the entire possession of the money, and that consequently there was not a sufficient trespass to constitute a larceny; and I feel myself bound by that decision."

The prisoner was accordingly acquitted.³⁸

³⁷ Accord: Flynn v. State, 47 Tex. Cr. 26, 83 S. W. 206; Levy v. State, 79 Ala. 259; Huber v. State, 57 Ind. 341, 26 Am. Rep. 57; Hecox v. State, 105 Ga. 625, 31 S. E. 592.

³⁸ Accord: Mobley v. State, 114 Ga. 544, 40 S. E. 728.

JUSTICES OF COURT OF SPECIAL SESSIONS v. PEOPLE.

1882. COURT OF APPEALS OF NEW YORK. 90 N. Y. 12,
1 N. Y. Cr. 83, 43 Am. Rep. 135.

Error to the General Term of the Supreme Court, in the first judicial department, to review order made March 15, 1882, which reversed a judgment of Court of Special Sessions of the Peace in and for the city and county of New York, entered upon a verdict convicting the said Henry Henderson of the crime of larceny. (Reported below, 26 Hun 537.)

The evidence on the part of the prosecution showed that one Robertson went into the saloon kept by the prisoner and procured some lager, the price for which was twenty-five cents. He handed the prisoner a \$20 gold piece, and he being unable to change it, was requested by Robertson to go out and get the change. The prisoner went out and did not return; he lost the money gambling.³⁹

* * * * *

TRACY, J.—The \$20 gold coin was intrusted to the relator for the single and specific purpose of having it changed into other money, to be returned to the prosecutor. The relator had no property or interest in the coin, and the prosecutor never intended to part with his property therein. The relator left his restaurant with the coin under pretense of obtaining change, and immediately gambled it away and did not return. These facts warranted the jury in finding that, when he left the presence of the prosecutor he took the coin with him with the intent to steal it. This, within all the authorities, except the one hereinafter referred to, justified his conviction for larceny. (Hildebrand v. The People, 56 N. Y. 394, 15 Am. Rep. 435; Loomis *et al.* v. The People, 67 N. Y. 326, 23 Am. Rep. 123; Hawkins' Pleas of the Crown, vol. 1, p. 210; Russell on Crimes, vol. 2, p. 21.) In Russell on Crimes and in Hawkins' Pleas of the Crown the rule is stated as follows: "So, also, if a watchmaker steal a watch intrusted to him to clean, or if one steal clothes delivered to him for the purpose of being washed, or guineas delivered for the purpose of being changed into half guineas, or a watch delivered for the purpose of being repaired, in all these circumstances the goods taken have been thought to remain in possession of the proprietor, and the taking of them away held to be felony." Hawkins cites, to each of these cases, an authority on which it rests. One of the cases so cited is that of Ann Atkinson, in which it was held that if one stole guineas delivered for the purpose of being changed into half-guineas, it was larceny. (Cas. Cro. Law, 2477.) The case of Reg. v. Thomas is a *nisi prius* case, reported in 9 C. & P. 741, where it was held by Coleridge, J., that "the prose-

³⁹ Arguments of counsel are omitted.

cutor, having permitted the sovereign to be taken away for change, could never have expected to receive back that specific coin. He has, therefore, divested himself at the time of the entire possession of the sovereign, consequently I think there was not a sufficient trespass to constitute larceny."

The learned presiding justice who delivered the opinion of the General Term in this case fell into an error in supposing that the doctrine of the case of *Reg. v. Thomas* had been adopted by this court as the law of this state. In the case of *Hildebrand v. The People* (56 N. Y. 394-397, 15 Am. Rep. 435), where this court is supposed to have adopted the rule laid down in the case of *Reg. v. Thomas*, the plaintiff had been convicted of stealing a \$50 bill, handed him to take out ten cents in payment for a glass of soda. The prisoner put down a few coppers upon the counter, and, when asked for the change, took the prosecutor by the neck and shoved him out of doors and kept the money. The prisoner was convicted, and the conviction was affirmed by this court. The case of *Reg. v. Thomas* was cited and relied upon by the prisoner. The facts of the two cases differed and, after criticizing the case of *Reg. v. Thomas* as a *nisi prius* case, and not authoritative for that reason, the court pointed out the difference between the facts of that case and the facts of the case then being considered, without overruling or affirming the doctrine of *Reg. v. Thomas*.

In *Loomis et al. v. The People* (67 N. Y. 329; 23 Am. Rep. 123) the case of *Reg. v. Thomas* was again referred to, and this court there declared that the weight of authority was decidedly opposed to the doctrine of that case and again affirmed a conviction, in which that case was relied upon as an authority for reversal. The decisions of this court have been uniformly against the doctrine of *Reg. v. Thomas*.

In *The People v. McDonald* (43 N. Y. 61), this court held that "if money or property is delivered by the owner to a person for mere custody or for some specified purpose, the legal possession remains in the owner, and the criminal conversion of it by the custodian is larceny."

Again, in *Smith v. The People* (53 N. Y. 111, 13 Am. Rep. 474), it was said by Allen, J., that "when the delivery of goods is made for a single and specific purpose, the possession is still supposed to reside, not parted with, in the first proprietor."

The rule of *Reg. v. Thomas* was never adopted by this court, is not good law, and should be disregarded.

Judgment of the General Term should be reversed and the judgment of the special sessions affirmed.

All concur.

Judgment accordingly.⁴⁰

⁴⁰ Accord: *Farrell v. People*, 16 Ill. 506. May, in his work on criminal

(d) Possession as Between Master and Servant.

"Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But, by statute, 33 Hen. VI, ch. 1, the servants of persons deceased accused of embezzling their masters' goods may, by writ out of chancery (issued by the advice of the chief justices and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of King's Bench to answer their masters' executors in any civil suit for such goods and shall, on default of appearance, be attainted of felony. And, by statute, 21 Hen. VIII, ch. 7, if any servant embezzles his master's goods to the value of forty shillings, it is made felony, except in apprentices and servants under eighteen years old. But if he had not the possession, but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law." 4 Black. Com. 230-231.

CROCHERON v. STATE.

1888. SUPREME COURT OF ALABAMA. 86 Ala. 64,
5 So. 649, 11 Am. St. 18.

Appeal from Circuit Court, Marengo County; W. E. Clarke, Judge.

The defendant in this case, Lewis Crocheron, was indicted for the larceny of a mule, the property of Newton Marx, and was convicted under the charge of the court. On the trial, as the bill of exceptions shows, said Marx testified on the part of the state that he employed the defendant on his place during the year 1887, "to perform the ordinary service of a field hand; that the defendant, as such, did plow, feed, and generally use the mule alleged to have been stolen; that one day during said year, before the finding of the indictment, defendant took the mule and went to the field, where he plowed it until nearly sunset, when he took it out of the plow and went to water it"; and that he did not see the mule again for several days, when he found it in the possession of one Childs, in Marion, to whom the defendant had sold the animal. The de-

law, says (at p. 279) of the doctrine that where property is delivered by the owner for a single and special purpose, possession still resides with him, that it can be "sustained only by an extension of the technical rule of possession in the case of master and servant," and that "the cases actually resting on this ground are too few to make it clear just what is meant by a 'special purpose.'"

defendant asked the court to charge the jury, in writing, "that if they believed the defendant had charge of the mule and took it out of the plow whilst in his custody, then he is not guilty of larceny." The court refused to give this charge to the jury, and the defendant thereupon excepted.⁴¹

SOMERVILLE, J.—The conviction of the defendant for larceny was proper under the circumstances. The prosecutor had parted only with the custody of the mule, as distinguished from the possession, which was still in him as owner, although the defendant had the custody of the animal as mere employee or servant. It has often been decided, and is now settled law, that goods in the bare charge or custody of a servant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use. *Oxford v. State*, 33 Ala. 416; 2 Bish. Crim. Law (7th ed.), § 639. In all such cases, the custody of a servant is distinguishable from that of a bailee or other person who has a special property in the goods, by reason of being under a special contract with respect to them. A mere servant or employee has no such special property. 3 Greenl. Ev. (14th ed.) 162. Where, however, a bailee, having such special property in goods, converts them to his own use, no conviction of larceny can be had without proving a fraudulent or felonious intention on his part at the time he received the goods in bailment. 2 Whart. Crim. Law (9th ed.) 963; *Watson v. State*, 70 Ala. 13, 45 Am. Rep. 70. The charge requested by the defendant was in direct conflict with this view of the law and was properly refused. The judgment is affirmed.

AABEL v. STATE.

1910 SUPREME COURT OF NEBRASKA. 86 Nebr, 711,
126 N.W. 316, 136 Am. St. 719.

REESE, C. J.⁴²—* * * The evidence shows that plaintiff in error was a clerk for Mr. Logan in a store owned by Logan; that he carried a key to the store, opened and swept out in the morning, and closed the door in the evening; that he assisted in making sales, and when necessity therefor arose, on account of the absence of Mr. Logan, purchased groceries in keeping up the stock. Mr. Logan was in the store the greater portion of the time, although at times absent, and his wife also gave her attention to the busi-

⁴¹ Arguments of counsel are omitted.

⁴² Part of the opinion is omitted.

ness of the store, so that plaintiff in error appears to have been in the exclusive possession of the store at no time, but had access to all its parts, and to all the goods kept for sale in the course of trade. It was while thus employed that he is charged with stealing the goods. From the evidence there seems to be no doubt of his having taken, and assisted in taking, them from the store and secreted them in other places.

At the close of the evidence plaintiff in error asked the court to instruct the jury to return a verdict finding him not guilty, for the reason that the evidence was not sufficient to sustain the charge of larceny, but tends to show that, if any crime was committed by him, it was not larceny, but embezzlement. The court refused to give this instruction. The same contention was presented in another instruction to the same effect, but submitting the facts to the jury with the direction that, if they found the facts to be practically as testified to, the crime, if any, would be embezzlement, and not larceny. This instruction was also refused, and the action of the court is assigned for error. In this we all agree the court did not err. The provisions of § 121 of the Criminal Code, defining the crime of embezzlement, as applicable to this case, is to the effect that if any clerk, agent, servant, etc., shall embezzle or convert to his own use, or fraudulently make way with any goods of his employer "which shall come into his or her possession or care by virtue of such employment," such person upon conviction shall be punished as provided in the section.

Plaintiff in error was one of several clerks in the store. He was furnished with a key to the front door of the building, opened and closed the store morning and evening, and was authorized to replenish the grocery department of the business by the purchase of groceries when necessary, in the absence of the proprietor, but the store and goods were at all times in the "possession" of the owner. It is true that in a sense plaintiff in error was the custodian of the store during the absence of the proprietor and his wife, and perhaps the other clerks, but we find no proof in the record which tends to show that either the store or goods were at any time in his possession. * * *

The same question was presented in *People v. Wood*, 2 Parker's Cr. R. (N. Y.) 22, where the accused was convicted; also in *Powell v. State*, 34 Ark. 693, and it was held: "The possession of the servant is that of the master. The former has a mere custody. If he appropriates the property of his master to his own use, with intent to steal, it is larceny at common law." This was followed and approved in *Atterbury v. State*, 56 Ark. 515, 20 S. E. 411. See, also, 15 Cyc. 493, and 25 Cyc. 31. * * *

The punishment imposed was imprisonment in the state penitentiary for the period of five years, to which is added the judgment

for costs. When we consider that the more enlightened modern thought, the holdings and decisions of courts, the teachings of penologists, eminent in their profession, have now fully adopted the humane and beneficent rule that the infliction of penalties for violations of the criminal laws are to be considered as in no sense a punishment, but rather for the reformation of the wayward and the protection of society, and that the spirit of vengeance has departed from criminal procedure, we are persuaded that so long a sentence for the act proved can not be justified.

The sentence pronounced by the district court will therefore be modified, and the term of imprisonment fixed at two years, the judgment for costs to stand as entered. As thus modified, the judgment of the district court will be and is affirmed, and the costs of this court will be taxed to plaintiff in error.

Modified and affirmed.⁴⁸

REX v. SULLENS.

1826. CROWN CASE RESERVED. 1 Moody C. C. 129.

The prisoner was tried before Alexander, C. B., at the Spring Assizes for the County of Essex, in the year 1826, on an indictment at common law; the first count of which charged the prisoner with stealing at Doddinghurst, on the 25th of September, 1825, one promissory note, value £5, the property of Thomas Nevill and George Nevill, his masters; the second count with stealing silver coin, the property of Thomas Nevill and George Nevill.

It appeared in evidence that Thomas Nevill, the prisoner's master, gave him a £5 country note, to get change, on the said 25th of September; that he got change, all in silver, and on his obtaining the change he said it was for his master, and that his master sent him. The prisoner never returned.

The jury found the prisoner not guilty on the first count, but guilty on the second count.

The question reserved for the consideration of the judges was whether the conviction was proper, or whether the indictment should not have been on the statute 39 G. 3, ch. 85, for embezzlement.

In Easter term, 1826, the judges met and considered this case, and held that the conviction was wrong, because as the masters never had possession of the change, except by the hands of the prisoner, he was only amenable under the statute 39 G. 3, ch. 85 (b).

⁴⁸ Accord: *Marcus v. State*, 26 Ind. 101; *Crook v. State*, 39 Tex. Cr. 252, 45 S. W. 720; *State v. Jarvis*, 63 N. Car. 556; *Walker v. Commonwealth*, 8 Leigh (Va.) 743; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; *Powell v. State*, 34 Ark. 693; *Manson v. State*, 24 Ohio St. 590.

REGINA v. REED.

1854. COURT OF CRIMINAL APPEALS. 6 Cox Cr. C. 284.

The following case was reserved by the Court of Quarter Sessions for the county of Kent:

At the General Quarter Sessions of the Peace for the county of Kent, holden at Maidstone, on the 4th of January, 1853, before Aretus Akers, Edward Burton, and James Espinasse, Esqrs., justices appointed to try prisoners in a separate court, Abraham Reed was tried upon an indictment for feloniously stealing 200 pounds' weight of coals, the property of William Newton, his master, on the 6th of December, 1852; and James Peerless was charged in the same indictment with receiving the coals, knowing the same to have been stolen, and was acquitted.

The evidence of the prosecutor, William Newton, was as follows:—"I am a grocer and miller, at Cowden, and sell coals by retail. The prisoner, Reed, entered my service last year, about three weeks before the 6th of December. On that day I gave him directions to go to a customer to take some flour, and thence to the station at Edenbridge, for 12 hundredweight of coals. I deal with the Medway Company, who have a wharf there, Holman being wharfinger. I told Reed to bring the coal to my house. Peerless lives about 500 yards out of the road from the station to my house. Reed went about nine a. m. and ought to have come back between three and four p. m.; but as he had not come back, I went in search of him at half-past six, and found him at Peerless'. The cart was standing in the road opposite the house, and the two prisoners were taking coals from the cart in a truck basket. It was dark. I asked Reed what business he had there. He said: 'To deliver half a hundredweight for which he had received an order from Peerless.' Reed had never before told me of such an order, and had no authority from me to sell coals. Later that evening I went and asked Peerless what coals he had received from my cart. He said, half a hundredweight. I then asked him how they were carried from the cart. He said, in a sack. I weighed the coals when brought home, and found the quantity so brought a quarter of a hundredweight and four pounds short. I went to Peerless' next day and found some coals there, apparently from half to three-quarters of a hundredweight." * * *

LORD CAMPBELL, C. J.⁴⁴—There lies before me a judgment that I had prepared for myself at a time when there was reason to suppose that there might be one, if not more, dissenting judges. I

⁴⁴ Part of the statement of facts, and of the opinion, the arguments of counsel, and the concurring opinions of Jervis, C. J., and Parke, B., are omitted.

have reason to believe now that there will not be any dissent; but still this judgment must be considered only as embodying the reasons I give for my opinion, because I have no authority to say that my brothers concur in that opinion, and the reasons for it. For convenience I have written my judgment and my learned brothers will say how far they concur or dissent. I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that, in such a case, the goods must have been in the actual or constructive possession of the master; and that, if the master had not otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterward converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have therefore to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart, at the time when the coals were deposited in it; and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny. That is expressly determined in Robinson's case (2 East. 565). There seems considerable difficulty in contending that, if the master was in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his order, for his use. Mr. Ribton argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ultimate destination. But he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination," when so used. He admitted that the mas-

ter's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. * * * It is said there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart; but the objection rests on a subtlety wholly unconnected with the moral guilt of the prisoner, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement; and I do not think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner, who stole it, was sufficiently answered by the subtlety that when the prisoner had once parted with the personal possession of it, so that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished, as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime, instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offences created by common law or by statute, nice distinctions must arise, and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction; for the only objection to it is founded upon an argument that he ought to have been convicted of another offense of the same character, for which he would have been liable to the same punishment.

Conviction affirmed.⁴⁵

COMMONWEALTH v. RYAN.

1892. SUPREME JUDICIAL COURT OF MASSACHUSETTS.

155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. 560.

HOLMES, J.⁴⁶—This is a complaint for embezzlement of money.

⁴⁵ Accord: *Rex v. Abrahath*, 2 East P. C. 569, 2 Leach C. C. 824; *Rex v. Mallison*, 20 Cox Cr. C. 204; *Warmoth v. Commonwealth*, 81 Ky. 133, 4 Ky. L. 937.

⁴⁶ Statement of facts, and part of the opinion are omitted.

The case for the government is as follows: The defendant was employed by one Sullivan to sell liquor for him in his store. Sullivan sent two detectives to the store, with marked money of Sullivan's, to make a feigned purchase from the defendant. One detective did so. The defendant dropped the money into the money drawer of a cash register, which happened to be open in connection with another sale made and registered by the defendant, but he did not register this sale, as was customary, and afterward—it would seem within a minute or two—he took the money from the drawer. The question presented is whether it appears, as matter of law, that the defendant was not guilty of embezzlement, but was guilty of larceny, if of anything. The defendant asked rulings to that effect on two grounds: First, that after the money was put into the drawer it was in Sullivan's possession, and therefore the removal of it was a trespass and larceny; and secondly, that Sullivan's ownership of the money, in some way not fully explained, prevented the offence from being embezzlement. We will consider these positions successively.

We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian. *Commonwealth v. King*, 9 Cush. 284; while, on the other hand, if the property is delivered to the servant by his master, the conversion is larceny. *Commonwealth v. Berry*, 99 Mass. 428; *Commonwealth v. Davis*, 104 Mass. 548.

This distinction is not very satisfactory, but it is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offence. *King v. Bazeley*, 2 Leach (4th ed.) 843, 848, note; 1 Leach (4th ed.) 35, and note; 2 East P. C. 568, 571. * * * (Historical review of cases is here omitted.)

The last mentioned decisions made it necessary to consider with care what more was necessary, and what was sufficient, to reduce the servant to the position of a mere custodian. An obvious case was when the property was finally deposited in the place of deposit provided by the master, and subject to his control, although there was some nice discussion as to what constituted such a place. *Regina v. Reed*, Dears C. C. 257. No doubt a final deposit of money in the till of a shop would have the effect. *Waite's case*, 2 East P. C. 570, 571; 1 Leach (4th ed.) 28, 35, note. *Bull's case*, 2 East P. C. 572; 2 Leach (4th ed.) 841, 842. *The King v. Bazeley*, 2 East P. C. 571, 574; 2 Leach (4th ed.) 835, 843, note. *Regina v. Wright*, Dears & B. 431, 441. But it is plain that the mere physical presence of the money there for a moment is not conclusive while the servant is on the spot and has not lost his power over it;

as, for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important; for, apart from other considerations, the character in which he exercises his control depends entirely upon himself. *Sloan v. Merrill*, 135 Mass. 17, 19; *Jefferds v. Alvard*, 151 Mass. 94, 95. *Commonwealth v. Drew*, 153 Mass. 588, 594.

It follows from what we have said that the defendant's first position can not be maintained, and that the judge was right in charging the jury that, if the defendant, before he placed the money in the drawer, intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it, just afterward, larceny. The distinction may be arbitrary, but, as it does not affect the defendant otherwise than by giving him an opportunity, whichever offence he was convicted of, to contend that he should have been convicted of the other, we have the less uneasiness in applying it.

With regard to the defendant's second position, we see no ground for contending that the detective in his doings was a servant of Sullivan, or that he had not a true possession of the money, if that question were open, which it is not. The only question reserved by the exceptions is whether Sullivan's ownership of the money prevented the defendant's act from being embezzlement. It has been supposed to make a difference if the right of possession in the chattel converted by the servant has vested in the master previous to the delivery to the servant by the third person. 1 Eng. Crim. Law Com'rs Rep. (1834), 31, pl. 4. But this notion, if anything more than a defective statement of the decisions as to delivery into the master's barge or cart (*Rex v. Walsh*, 4 Taunt. 258, 266, and *Regina v. Reed*, *ubi supra*), does not apply to a case like the present, which has been regarded as embezzlement in England for the last hundred years. *Bull's case*, stated in *The King v. Bazeley*, 2 Leach (4th ed.) 835, 841; 2 East P. C. 571, 572; *The King v. Whittingham*, 2 Leach (4th ed.) 912; *The King v. Hedge*, 2 Leach (4th ed.) 1033, Russ. & Ry. 160; *Regina v. Gill*, Dears C. C. 289. If we were to depart from the English decisions it would not be in the way of introducing further distinctions. See *Commonwealth v. Bennett*, 118 Mass. 443, 454.

Exceptions overruled.⁴⁷

⁴⁷ In *People v. Burr*, 41 How. Pr. (N. Y.) 293, the defendant was indicted for embezzlement and convicted. He was employed by the prosecutor who kept a shoe store, to manufacture raw materials furnished by the prosecutor into shoes, doing the work at his own home, and being paid, instead of regular wages, according to the quantity of work performed, and was not exclusively employed by the prosecutor. He converted the completed shoes to his own use. In discussing the question

of whether the defendant was a clerk or servant of the prosecutor, Troy, J., defines who are "servants" for the purposes of the crimes of larceny and embezzlement, as follows: "Now, the facts in this case being settled, the first question arising for determination is, does the defendant come within the class of persons described in the statute by whom the crime of embezzlement can be committed? In other words, was he a clerk or servant of the prosecutor? I do not think he was either; he was certainly not the clerk of the prosecutor, and I can not regard him as his servant in any sense of the term; of course, the term "servant" does not mean, nor is the language limited in its application to the mere menial servant of the prosecutor, but it does mean and intend that relation between the parties which gives the employer the right to order, command, direct and control, and imposes on the person employed the duty of obedience and subjection in the performance of the particular service, at all times and in every particular, and with regard to the property of the master delivered by him to the servant in the course of such employment, gives to such servant the temporary custody thereof merely, the legal possession remaining in the owner.

The employment of the prisoner in this case was not of such character, it was an independent contract and created, not the relation of master and servant, but that of bailor and bailee. The property was delivered to the prisoner in pursuance of this contract to be returned to the bailor when the contract was completed, the bailor parting not only with the custody but with the possession and his right to control same, until the completion of the contract, reserving no right to control or direct the bailee in the meantime, either in the performance of the work, the place of performance or the agency or manner of such performance.

The bailor could not demand, nor would he be entitled to reclaim, the said property before the completion of the contract; he could not dictate to the bailee as to whether the bailee himself should do the work or whether it should be done by others under the bailee's direction; he had no right to say at what place or places it should be done, or prescribe the means of doing it; he could only hold the bailee responsible for a performance of the contract, without having any power over the agency by which such performance was effected, and when the contract was completed he could not then compel a delivery of the property without paying the contract price; on the other hand, the bailee had a right to perform the work where he pleased, to do it himself, or employ others to do it, as he thought proper; his duty to the bailor was to fulfil the contract; the way, manner, and means, of such fulfilment resting entirely with himself. He had a lien also upon the property for the contract price, and the right to hold the property as against the bailor for a sufficient time to perform the contract, and thereafter until paid he had not only the custody but the possession of the property, and possession coupled with an interest as against the bailor, the right of the prosecutor as owner to reclaim or interfere with the property being suspended during the performance of the contract.

On the other hand, a servant is at all times and places, while in the service of the master and about the performance of his servitude, subject to the commands and directions of such master; the manner of performing the work, the means of such performance, the place thereof, and all the details in respect thereto, are equally within his control; he can stop the work when he sees fit, change the original directions given about it from time to time, do it as he pleases and alter it again as he may desire; take the property from the custody of the servant, and discharge him at his pleasure. The servant would have a mere custody, the legal possession remaining in the master. The servant

(c) Possession as Between Bailor and Bailee After Breaking Bulk.

STATE v. FAIRCLOUGH.

1860. SUPREME COURT OF ERRORS OF CONNECTICUT. 29 Conn. 47,
76 Am. Dec. 590.

Information for larceny. The defendants, husband and wife, were requested by one Goodsell, of Woodbridge, in New Haven county, by whose house they were passing in a wagon on their way to New Haven, to carry to New Haven a box containing jewelry and other valuables and deliver the same at a certain jewelry store there. They had been left at the house of Goodsell by a Mrs. Comer, the owner, who had requested that they should be forwarded to her at the place named in New Haven. The box was wrapped in paper and tied up with twine. The defendants took it and agreed to deliver it as requested, but declined to take any compensation for their trouble. They never delivered it, and were afterwards found in possession of some of the articles which were in the box at the time, and were prosecuted for larceny.

On the trial the judge charged the jury that if they should find that the defendants took the package in question upon an agreement to take the same to New Haven and deliver it there as directed, and on the way there, or before the bailment terminated, broke the package for the purpose, and with the felonious intent to take and convert the contents to their own use, and did so break and take and convert a part or all of the contents of the package, they were guilty of theft.

The jury having found the defendants guilty, they moved for a new trial for error in the charge of the court.

STORRS, C. J.⁴⁸—The defendants in this case were plainly either the servants or bailees of the owner of the goods alleged to have been stolen, but which of these relations they sustained to him it is unnecessary to consider, because, whichever it was, the charge of the court below was, in our opinion, correct.

If they were only his servants it is well settled and, indeed, is admitted, that they had no property in the goods and that the

would have no lien for his labor on the property, and without possession none could exist. The master would have the absolute control—the servant would be the mere machine.

The distinctive characteristics of the relation of master and servant and bailor and bailee are so clearly marked and defined that no doubt can be entertained of the real nature of the relationship existing between the prosecutor and the prisoner. In this case it was that of employer and employee, under a contract between the parties whereby mutual and independent rights were created and conferred, and the prisoner was in no sense of the term either the clerk or the servant of the prosecutor." See also *State v. Levine*, 79 Conn. 714, 66 Atl. 529.

⁴⁸ Arguments of counsel are omitted.

possession of them, by their delivery to the defendants, was not in law changed, but remained as before in the owner, the possession of a servant in such a case being the possession of the owner, and that therefore, if, while they were in charge of the defendants, they converted all or any of the goods to their own use *animo furandi*, it was a larceny, although the intention to convert them was not conceived until after they were delivered to them.

If, however, the defendants were not the servants but the bailees of the owner, it is equally clear from the authorities that their breaking of the package containing the goods and conversion of them to their use *animo furandi* while they were on their way to the place where they agreed to carry them, constituted a larceny, although they were not originally received by the defendants with any such intention, and that therefore, in this view of the case, the charge below was correct. The general principle, as stated by all the elementary writers on criminal law, and, as we think, established by all the adjudged cases from the earliest times, is, that if a carrier or other bailee opens a package of goods and takes away and disposes of them or any of them to his own use, *animo furandi*, it is larceny, although it is not if he takes away and converts the whole package entire. The principle is thus stated by Lord Coke: "If a bale or pack of merchandise be delivered to carry to one, at a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take anything out *animo furandi*, this is larceny; likewise if a carrier carry it to the place appointed, and afterward take the whole pack *animo furandi*, this is larceny also; for the delivery had effect, and the privity of bailment is determined." 3 Co. Inst. 107; 1 Arch. Crim. Pl. 192; Roscoe's Cr. Ev. 543. Commentators do not agree as to the reason for the distinction between the taking and conversion of the entire package delivered to the carrier and of a part only of its contents. Some suppose that it proceeds on the ground that the breaking of the package furnishes proof that the goods were originally taken with a felonious intention. But the answer to this explanation, suggested by Mr. East, appears to be quite satisfactory, that if taking a part is evidence of the original felonious intent, no less would the taking of the whole be. 2 East P. C. 697. Others, however, consider the distinction to be founded on the principle that, by the tortious act of the carrier in breaking the package and abstracting the contents, the contract of bailment to him is determined, and that he therefore thereby ceases to have any special property in the goods, and stands in no better situation in respect to the possession of them than a servant having the mere charge or custody of them. This latter reason, although of a somewhat refined and artificial character, is the most prevalent, and indeed it is now generally considered, and we think properly, as the true one. 3 Co.

Inst. 107; 1 Arch. Cr. Pl. 192; 1 Hawk. P. C., ch. 33, *æ* 5, 7; 1 Hale P. C. 504; 2 East P. C. 695.

If the principle which has been stated, regarding the breaking of a package by a carrier, be a universal one, it is conceded that the jury in this case were properly instructed. But the counsel for the defendants, while they admit the principle to be generally true, deny that it is universal, and claim that it does not apply to a carrier who transports goods gratuitously, but only to one who carries for hire, and they therefore insist, as they properly may if there is this exception or qualification to this general rule, that as the defendants were to transport the property in question gratuitously, in order to render them guilty of larceny it was necessary to show that they originally received it with a felonious intention. We perceive no just ground for such a distinction between a gratuitous carrier and one for hire. In point of morality there is no difference between them. The reason, whatever it may be, for the rule as to the opening of a package and the conversion of its contents is equally applicable to both. Nor do we discover that any such distinction is recognized or acted on in the adjudged cases. It is indeed probable that in most of the cases of indictments against carriers they were to receive a compensation. But in many of them it is not stated whether such was the case, and in none of them does the decision appear to be influenced by that circumstance. And although in several of them it would seem that there was a ground for this distinction if it had been supposed to exist, in none of them was it raised, excepting in the case of *Regina v. Jenkins* (9 Car. & P. 38), in which the distinction was disallowed. See, also, *Rex v. Jones*, 7 Car. & P. 151; *Cheadle v. Buell*, 6 Ohio 67.

We therefore do not advise a new trial.

In this opinion the other judges concurred.

New trial not advised.⁴⁹

(E) APPROPRIATION OF LOST AND MISLAID PROPERTY.

"If A find the purse of B in the highway, and take it and carry it away, and hath all the circumstances that may prove it to be

⁴⁹ Accord: Where goods are bailed in a package, the cover is broken, and some or all the articles are then taken. *Rex v. Brazier*, R. & R. C. C. 337; *Rex v. Jones*, 7 C. & P. 151, and *Cheadle v. Buell*, 6 Ohio 67 (opening a letter and taking contents); *Robinson v. State*, 1 Cold. (Tenn.) 120, 78 Am. Dec. 487 (opening a trunk and taking contents); see also, *Reg. v. Poyser*, 5 Cox Cr. C. 241, and *Reg. v. Jenkins*, 9 C. & P. 28. Some cases hold that where goods are bailed in a loose mass of units the separation and appropriation of a part constitutes larceny by breaking bulk. *Nichols v. People*, 17 N. Y. 114; *Commonwealth v. James*, 1 Pick. (Mass.) 375; *Commonwealth v. Brown*, 4 Mass. 580; *Rex v. Howell*, 7 C. & P. 325; but see contra, *Rex v. Maddox*, R. & R. C. C. 69, and *Rex v. Pratley*, 5 C. & P. 533.

done *animo furandi*, as denying it or secreting it, yet it is not felony; the like in case of taking of a wreck or treasure-trove (22 Assiz. 99) or a waif or stray. * * *

"Where a man's goods are in such a place where ordinarily they are or may be lawfully placed, and a person takes them *animo furandi*, it is felony, and the pretense of finding must not excuse." 1 Hale P. C., ch. 43, p. 506.

REGINA v. THURBORN.

1849. CROWN CASE RESERVED. 1 Denison C. C. 387.

The prisoner was tried before Parke, B., at the Summer Assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner and had dropped it accidentally; he then changed it and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe it to be the prosecutor's property, before he thus changed the note.

The learned Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with Maule, J., the learned Baron was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and he therefore declined to pass sentence and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by Parke, B.⁵⁰:

* * * In the present case there is no doubt that the bank note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore, though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use

⁵⁰ Part of the opinion is omitted.

by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, "*Quia Dominus rerum non apparet ideo cuius sunt incertum est*," and the rule is held not to apply when it is certain who is the owner; but the authorities are many and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported cases on this subject. Some where the owner of goods may be presumed to be known, from the circumstances under which they are found; amongst these are included the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use, or a pocket-book, found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict.⁵¹ Some

⁵¹ In *Lawrence v. State*, 1 Humphr. (Tenn.) 228, 34 Am. Dec. 644, Reese, J., says at page 231: "The defendant's counsel answers the question in the negative, and strenuously contends that, the prosecutor having gone away from the shop without remembering that he had left his pocketbook behind him, the same, during the time his mind remained in that state, may be said to have been lost; and that it has been determined in the case of *Porter v. State*, M. & Y. (Tenn.) 226, that the fraudulent appropriation of lost goods, even where the finder knows the owner, is not larceny. We answer that the pocketbook, under the circumstances proved, was not lost, nor could the defendant be called a finder. The pocketbook was left, not lost. The loss of goods, in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner as to their locality at any given moment. If I place my watch or pocketbook under my pillow in a bed-chamber, or upon a table or bureau, I may leave them behind me, indeed, but, if that be all, I can not be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend, and then forget it, it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To

cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as Wynne's case, Leach C. C. p. 460, but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, checks, or bills, with the owner's name upon them.

This subject was considered in the case of *Merry v. Green*, 7 M. & W. 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a check, for instance, with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then as soon as he knew whose it was, took it, *animo furandi*; as, in order to constitute a larceny, the taking must be a trespass, and it was asked when in such a case the trespass was committed? In answer to that inquiry the dictum attributed to me in the report was used; that in such a case the trespass must be taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use, *animo furandi*.

It is quite a mistake to suppose, as Mr. Greaves has done (vol. 2, ch. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W., which, taken alone, seems to be applicable to every case of finding unmarked, as well as marked property. It was meant to apply to the latter only.

The result of these authorities is that the rule of law on this subject seems to be that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner can not be found, it is not larceny. But if he takes them with the like in-

place a pocketbook, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property; and we are of opinion, therefore, that there was no error in the charge of the court in reference to the facts in this case, and we affirm the judgment."

See, also, in accord: *State v. Cummings*, 33 Conn. 260, 89 Am. Dec. 208; *State v. McCann*, 19 Mo. 249; *People v. McGarren*, 17 Wend. (N. Y.) 460; *State v. Farrow*, 61 N. Car. 161, 93 Am. Dec. 585; *Sovern v. Yoran*, 16 Ore. 269, 20 Pac. 100, 8 Am. St. 293; *Clifton v. State*, 52 Wis. 533, 9 N. W. 389.

tent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.⁵²

In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case: The first taking did not amount to larceny, because the note was really lost and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him and he then appropriated it, *animo furandi*, and the point to be decided is, whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, Does that make a difference? We think not; it was punishable as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case, more than the others, and consequently no larceny.

We therefore think that the conviction was wrong.

⁵² Accord: *State v. Swayze*, 11 Ore. 357, 3 Pac. 574; *State v. Clifford*, 14 Nev. 72, 33 Am. Rep. 526; *State v. Boyd*, 36 Minn. 538, 32 N. W. 780; *Brooks v. State*, 35 Ohio St. 46; *Reed v. State*, 8 Tex. App. 40, 34 Am. Rep. 732. The finder is not guilty of larceny because he fails to use diligence or pains to find the owner; *Brooks v. State*, 35 Ohio St. 46; but see *New York Penal Law*, § 1300.

(F) APPROPRIATION OF PROPERTY DELIVERED BY MISTAKE.

REGINA v. MIDDLETON.

1873. CROWN CASE RESERVED. L. R. 2 C. C. 38.

The prisoner was a depositor in a post-office savings bank, in which 11s. stood to his credit. He gave notice in the ordinary form to withdraw 10s., stating in his notice the number of his depositor's book and the amount to be withdrawn. A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the post office at N. to pay the prisoner 10s. He went to that office and handed his depositor's book and the warrant to the clerk. But the clerk, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for £8 16s. 10d., and placed the latter amount upon the counter. The clerk entered the amount paid, £8 16s. 10d., in the prisoner's depositor's book and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an *animus furandi*, and knowing the money to be the money of the postmaster-general.⁵³

* * * * *

Bovill, C. J., read the judgment of Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., as follows:

* * * In the present case the jury have found that the prisoner had *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the postmaster-general when he took it up. So far, therefore, as the

⁵³ The statement of facts is taken from the head note in the report. The rest of the head note follows:

"Held, by Cockburn, C. J., Bovill, C. J., Kelly, C. B., Blackburn, Keating, Mellor, Lush, Grove, Denman, and Archibald, JJ., and Pigott, B. (Martin, Bramwell, and Cleasby, BB., and Brett, J., dissenting) that the prisoner was guilty of larceny:

"By Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., on the ground that even assuming the clerk to have the same authority to part with the possession of and property in the money which the Postmaster-General would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; and the possession being obtained *animo furandi*, there was both a taking and a stealing within the definition of larceny:

"By Bovill, C. J., Kelly, C. B., and Keating, J., on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and therefore no property passed to the prisoner, and the possession was obtained *animo furandi*:

"By Pigott, B., on the ground that the mistaken act of the clerk in placing the money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny:

"Held by Martin, Bramwell, and Cleasby, BB., and Brett, J., that the prisoner was not guilty of larceny."

guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty; but the case states facts which raise the doubt whether, under the circumstances stated, this was a taking, and also whether it was a stealing, within the meaning put by the law on these averments in an indictment for larceny. And the circumstances which raise that doubt are as follows: Assuming that the clerk who actually was engaged in the transaction had such authority from the postmaster-general that all he did is to be taken as done by the postmaster-general, it is the first question whether the money can be said to have been taken by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this hypothesis is the postmaster-general) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake. Then a second question arises, whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the postmaster-general, intended that the property in the money should belong to the man before him, though he intended that in consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had, at the time of the taking, the guilty intention to steal the money. A third question arises in the event of the two first questions being determined in favor of the prisoner: viz., whether the clerk really had such general authority as to represent the postmaster-general, or whether his authority was not limited to paying the money specified in the letter of advice, viz., 10s., which special authority, if it was so limited, he did not pursue.

The majority of the judges, eight in number, have formed their judgment on the decision of the two first points in favour of the Crown, which therefore renders it unnecessary for them to decide the last.

The Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and my brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments.

It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it at all.

We now proceed to state the reasons on which we think that it ought to be held that there was, under the circumstances stated, a "taking" within the meaning of the averment in the indictment.

We agree that according to the decided cases it is no felony at common law to steal goods if the goods were already lawfully in the possession of the thief; and that, therefore, at common law a bailee of goods, or a person who finds goods lost, and not know-

ing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and felonious intention, converts them to his own use.

It is, to say the least, very doubtful whether this doctrine is either wise or just; and the legislature, in the case of bailees, have by statute enacted that bailees stealing goods, etc., shall be guilty of larceny, without reference to the subtle exceptions engrafted by the cases on the old law. But in such a case as the present there is no statute applicable, and we have to apply the common law.

Now we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking. We are not concerned at present to inquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established, and we think it is. The cases on the subject are collected in Russell on Crimes, 4th ed., vol. 2, p. 207; perhaps those that most clearly raise the point are *Rex v. Davenport*, 2 Russell on Crimes, 4th ed., at p. 201, and *Rex v. Savage*, 5 C. & P. 143; 2 Russell on Crimes (4th ed.), p. 201.

In the present case the finding of the jury that the prisoner, at the moment of taking the money, had the *animus furandi* and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.

On the second question, namely, whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows: At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear, from the very nature of the thing, that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean, and how this is material. Now, it is established that where a bargain between the owner of the chattel has been made with another by which the property is transferred to the other, the property actually passes,

though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber, in *Clough v. London and North Western Ry. Co.*, Law Rep. 7 Ex. 26, at pp. 34, 35, where it is said, "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Co. to Adams by the contract of sale; the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. * * * We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property; or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is *Reg. v. Prince*, Law Rep. 1 C. C. 150, which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretenses, and can not be convicted of larceny. In that case, however, the money was paid to the holder of a forged cheque payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case the property still remains that of the postmaster-general, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we can not test the case by seeing whether an innocent purchaser could have held the property. But let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not; and that on the principle enunciated by Lord Abinger, in

Chanter v. Hopkins, 4 M. & W., at p. 404, when he says: "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it."

We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*.

But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being that of larceny, though the intention was inoperative, and no property passed. In almost all the cases on the subject the property had actually passed, or at least the court thought it had passed; but two cases, *Rex v. Adams*, 2 Russell on Crimes, (4th ed.), at p. 200, and *Rex v. Atkinson*, 2 East P. C. 673, appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Rex v. Davenport*, 2 Russell on Crimes, 4th ed., at p. 201, and the others involving the same principle are law; and though if a long series of cases had so decided, we should think we were bound by them, yet we think that in a court such as this, which is in effect a court of error, we ought not to feel bound by two cases which, as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.

Conviction affirmed.⁵⁴

REGINA v. FLOWERS.

1886. CROWN CASE RESERVED. 16 Cox Cr. C. 33.

Case reserved for the opinion of this court by the learned Recorder for the borough of Leicester, at the last Epiphany Quarter

⁵⁴ Accord: Holding that where the defendant knows, upon receiving the money, that he is being overpaid by mistake, and yet determines to keep it, his appropriation is larceny. *Wolfstein v. People*, 6 Hun (N. Y.) 121; *Bailey v. State*, 58 Ala. 414; *Cooper v. Commonwealth*, 110 Ky. 123, 22 Ky. L. 1627, 60 S. W. 938, 52 L. R. A. 136, 96 Am. St. 426; *State v. Ducker*, 8 Ore. 394, 34 Am. Rep. 590; contra, *Jones v. State*, 97 Ga. 430, 25 S. E. 319, 54 Am. St. 433.

Sessions for that borough, upon the trial of an indictment which charged one Charles Flowers with having, on the 31st day of October, 1875, while being servant to one Samuel Lennard and another, feloniously stolen, taken, and carried away certain money to the amount of seven shillings and one penny half-penny the property of the said Samuel Lennard and another, his masters.

It appears from the case that the prisoner had been for about three months next preceding the 31st day of October, 1885, a clicker in the service of Messrs. Lennard Brothers, a firm of shoe manufacturers in Leicester, in whose establishment the following mode of payment of the wages of their employees was adopted, viz.:

The amount of wages due to each workman was calculated from the time-book and entered in the wages-book. Each amount was then made up and put into a small paper bag, which was then sealed, and the bags so secured were sent to the various rooms in which the men worked. The foreman of each of such rooms then distributed the bags containing the wages among the men under his charge. When a mistake occurred the workman affected thereby took his bag to one Francis Cufflin (the clerk) to have the mistake rectified.

On the 31st day of October there was due to the prisoner the sum of sixteen shillings and eight pence, and after the workmen had been paid their wages the prisoner came to Cufflin, and said that he was three pence short, and gave him the bag into which his money had been put. The top of the bag had been torn off, and the bag was empty. Another workman named Jinks had also come to Cufflin for a correction in his money, stating that five pence or six-pence was due to him, and had handed to Cufflin his bag with seven shillings and eleven pence halfpenny in it. Cufflin there-upon gave the prisoner by mistake Jinks's bag, and also three pence in copper, into his hand, and the prisoner, having received Jinks's bag, went away immediately, and in the presence of one of his fellow-workmen emptied the contents of Jinks's bag into his hand, saying: "The biter has got bit; he has paid me double wages." He then turned to another man and said: "Come on, we'll go and have a drink on it."

At the close of the case for the prosecution, it was submitted on behalf of the prisoner that there was no case to go to the jury, as the evidence failed to show that the prisoner at the time he received the seven shillings and eleven pence halfpenny from Cufflin had the *animus furandi*, or guilty mind, essential to constitute the offense of larceny, and that any subsequent fraudulent appropriation of the money by the prisoner was immaterial in so far as the offense of larceny was concerned.

The learned Recorder, however, held that there was evidence to go to the jury of the prisoner having the *animus furandi* at the

time he received from Cufflin the money, and he also ruled, in deference to the opinion of certain of the learned judges in *Reg. v. Ashwell* (53 L. T. Rep. [N. S.] 773, 16 Cox C. C. 1. 16 Q. B. Div. 190, 55 L. J. 65 M. C.),⁵⁵ that if the prisoner received the money innocently, but afterwards fraudulently appropriated it to his own use, he was guilty of larceny. Having directed the jury to this effect, he put to them the following questions, viz.:

1. Did the prisoner, from the time he received from Cufflin the bag containing the seven shillings and eleven pence halfpenny, know that it did not belong to him? To this the jury answered, No.

2. Did the prisoner, having received the bag and its contents innocently, afterwards fraudulently appropriate them to his own use? And to this the jury answered, Yes.

The learned Recorder thereupon directed a verdict of guilty to be entered on the first count of the indictment, which was that above set out, and reserved the question for the consideration of this court, whether, the jury not having found affirmatively that the prisoner had the *animus furandi*, at the time he received the seven shillings and eleven pence halfpenny from Cufflin, he could be rightly convicted of larceny by reason of the subsequent fraudulent appropriation by him of the said money to his own use?

No one appeared on behalf of the prosecution or of the prisoner.

LORD COLERIDGE, C. J.—This case might have raised a very subtle and interesting question. The manner in which the learned Recorder has stated it, however, raises a question which is distinguishable from that which was raised in the case of *Reg. v. Ashwell*. Now, in that case, the judges who decided in favour of the conviction never meant to question that which has been the law from the be-

⁵⁵ The head note to *Reg. v. Ashwell* follows: "A was indicted for larceny under the following circumstances: K, intending to lend A a shilling, handed him a sovereign, believing it to be a shilling. A, when he received the sovereign, believed it to be a shilling, and did not know until subsequently it was not a shilling. Immediately A became aware that it was a sovereign, and although he knew that K had not intended to part with the possession of a sovereign, but only with the possession of a shilling, and although he could easily have returned the sovereign to K, fraudulently appropriated it to his own use.

"Held (per Lord Coleridge, C. J., Grove and Denman, JJ., Pollock and Huddleston, BB., Hawkins and Cave, JJ.) that the taking was not complete when the sovereign was handed to A, and that there being an *animus furandi* on his part at the time when the taking was completed by his becoming aware of what it was which he had received, he was guilty of larceny at common law.

Held (per Field, Manisty, Stephen, Smith, Day, and Wills, JJ.) that the taking was complete at the time when K handed the sovereign to A, and, therefore, as at that time there was not any *animus furandi* on A's part, he was not guilty of larceny at common law.

Held, further, by a majority of the court, that A was not guilty of larceny as a bailee within 24 and 25 Vict., ch. 96, § 3."

Conviction affirmed.

ginning, and to hold that the appropriation of chattels which had previously been innocently received should amount to the offense of larceny. If that case is referred to, it will be seen that I myself assumed it to be settled law that where there has been a delivery of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute. In the present case, however, the learned Recorder appears to have directed the jury that, if the prisoner received the 7s. 11½d. innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny. But no such rule was intended to be laid down in *Reg. v. Ashwell*, and the direction of the learned Recorder was not, in my opinion, in accordance with that decision. It is quite possible for the jury to have considered consistently with that direction that a fraudulent appropriation, six months after the receipt of the money, would justify them in finding the prisoner guilty of larceny. The question we are asked is, whether the jury, not having found affirmatively that the prisoner had the *animus furandi* at the time he received the money, he was rightly convicted of larceny by reason of the subsequent fraudulent appropriation. In my opinion he was not. The judgments of those judges who affirmed the conviction in *Reg. v. Ashwell*, if carefully read, show that they considered that to justify a conviction for larceny there must be a taking possession simultaneously with the formation of the fraudulent intention to appropriate, and that was not the case here.

MANISTY, J.—I am of the same opinion. The difference of opinion among the judges who decided the case of *Reg. v. Ashwell* was in the application of the particular facts in that case of the settled principle of law that the innocent receipt of a chattel, coupled with the subsequent fraudulent appropriation of that chattel, does not amount to larceny. And while certain of the judges were of opinion that there had been a fraudulent taking and not an innocent receipt, and held that *Ashwell* had been guilty of larceny, the others, on the contrary, were of opinion that there had been an innocent receipt, and that, therefore, there had been no larceny. I am glad to think that the old rule of law remains unaffected.

HAWKINS, J.—The old rule of law was not questioned by any of the judges in *Reg. v. Ashwell*. This case is distinguishable, for here the learned Recorder told the jury that if the prisoner received the 7s. 11½d. innocently, but afterwards fraudulently appropriated that money to his own use, he was guilty of larceny. It appears clear to me that that direction could not be right, and that the learned Recorder misapprehended the rule of law.

DAY, J.—I was one of those who dissented from affirming the

conviction in *Reg. v. Ashwell*, and have only to add that, in my opinion, this conviction can not be supported.

GRANTHAM, J.—I am of the same opinion.
Conviction quashed.

REGINA v. HEHIR.

1895. CROWN CASE RESERVED (IRELAND), 18 Cox Cr. C. 267
(fully reported in 2 Ir. R. 709).

Case reserved by the Right Hon. the Lord Chief Baron, as follows:

At the assizes for the Munster Winter Assize County, 1894, held at Cork under the provisions of the Munster Winter Assize County Order, 1864, Denis Hehir was tried before me and a common jury for the larceny of "nine pounds sterling, of the goods and chattels of one John Leech"; but during the course of the trial, upon the application of Mr. Bourke, Q. C., counsel for the Crown, I allowed the indictment to be amended by striking out the words "nine pounds sterling," and substituting therefor the words "a ten-pound note." A copy of the indictment is contained in the appendix.

Evidence was given that John Leech, the master of the brigantine *Uzziah*, which was then in Limerick, engaged the prisoner, Denis Hehir, to assist in the discharge of the cargo. On the 20th day of September last Leech owed Hehir for work done in such discharge the sum of £2 8s. 9d. For the purpose of paying this sum, Leech, on said 20th day of September, handed the prisoner nine shillings in silver and two bank notes, each of which both Leech and the prisoner believed to be a £1 note. One of those notes was in fact a £10 note. The prisoner left, taking away the two notes with him. Within twenty minutes afterwards Leech discovered his mistake and went in search of the prisoner, whom he found within half an hour after he had given him the notes. Leech told the prisoner that he had given him a £10 note instead of a £1. The prisoner alleged that he had already changed both the notes. There was evidence that at the time when the prisoner first became aware that the note was for £10 (which was a substantial period after it had been handed to him by Leech) he fraudulently and without colour of right intended to convert the said note to his own use, and to permanently deprive the said John Leech thereof, and that to effectuate such intention the said prisoner shortly afterwards changed the said note and disposed of the proceeds thereof.

Mr. Bourke referred me to *Reg. v. Ashwell* (*ubi supra*) and *Reg. v. Flowers* (16 Cox C. C. 33, 54 L. T. Rep. 547).

In order to have an authoritative decision upon the question, upon which the Court for Crown Cases Reserved in England was, in *Reg. v. Ashwell*, equally divided, I left the case to the jury, who found the prisoner guilty, and I reserved for this court the question hereinafter stated. I allowed the prisoner to remain out on bail to come up for sentence at the next assizes for the county of the city of Limerick.

I request the opinion of this court upon the question, "Whether I ought to have directed a verdict of acquittal by reason of the prisoner not having had the *animus furandi* when Leech handed him the £10 note?"

C. PALLES.

MADDEN, J., said: I consider the conviction in the present case was good at common law. The law being the same in both countries, the English cases are applicable. We are not, however, absolved by *Reg. v. Ashwell* from the duty of forming an independent judgment. Does the evidence show the taking by Hehir to have been *invito domini*? If the handing of the note by Leech to Hehir amounted to delivery no fraudulent intention would suffice to constitute larceny. There was a fiscal transfer. Men are presumed to know the consequences of their own acts. Does the transfer of physical possession, made under such a mistake, amount to a delivery of legal possession? I think not, if it is accepted under a common mistake. If the owner intends the specific property to pass it is not larceny, but where there is a mistake as to identity it is different. There must be intelligent delivery, and not the mere physical fact from which intelligence is absent. I rest my judgment on the fact that the mistake was not one of value, but of identity; not the paper *per se*, but the money it represents. The case would be plainer if the exchange were carried on, as in some nations, by means of shells or precious stones. A mistake between a £10 note and a £1 note is the same. Any consent given or act done in consequence of such mistake can have no legal value whatever. The case of *Merry v. Green* presents no substantial or essential difference to the present case. It was a case of transfer of physical possession. Delivery was there made in ignorance of the existence of the chattel. In either case the *dominus* remained *invitus*, for the element of intelligent delivery was wanting. Cases of finding do not throw much light on the question. Assuming the *dominus* to be *invitus*, was there any felonious taking of the money at all? In *Reg. v. Middleton* the question was as to the effect of knowledge coincident with the taking. The rule which governs this case is simple; it is, "A man to whom a chattel is delivered under a mistake as to its identity does not thereby obtain legal possession; and if

he subsequently learns the mistake and retains its possession, he is guilty of larceny."

GIBSON, J., said: On the question of consent or non-consent there is no substantial difference between a bank-note and any other chattel. First, as to acquisition. Legal possession imports knowledge. Here there was a physical delivery without knowledge. Until knowledge the law should not attribute to the taker the object of taking without consent. If upon discovery he elects to return the chattel, then it amounts to custody rather than possession; if he appropriates, then either the possession becomes wrongful, or then and there, for the first time, there is a taking out of possession of the owner of the chattel, which previously was lost; he commits a tort. Secondly, as to the lawfulness of the possession. Consent by possession obtained by fraud or force *animo furandi* is unlawful. Physical delivery is evidence of consent, but is rebuttable. Even without *animus furandi* a taker who at delivery is aware of mistake, his possession is not innocent. The taker there is not misled. The question of consent is one of substance, not of form. Delivery under mistake does not work an estoppel. The taker is bound to give up the chattel on demand. The protection given to mistake does not extend to wilful fraud. I express no opinion on the question of bailment; it was not argued. Of seven cases relating to this principle of mistake, only two are against the view I take. The cases on lost property are distinguishable. The bureau cases seem in direct conflict with the post-office cases. Hehir, who is morally a rogue, is legally a thief.

HOLMES, J., said: All acts to carry legal consequences must be acts of the mind. The prosecutor did not intend to give, or know that he was giving, and Hehir did not intend to receive, or know he was receiving; therefore possession remained in the owner. When the taker discovers that he has a chattel which the owner did not intend to give, he then takes it for the first time, and if he retains it he is guilty of larceny.

MURPHY, J., said: As to the moral aspect of the defendant's conduct it was clearly just as bad as if he had picked the owner's pocket. But it is said that in consequence of the means he adopted he is not guilty of larceny. The case is governed by Reg. v. Ashwell, where fourteen judges were equally divided.

JOHNSON, J., said: In my opinion Hehir is not guilty, because a man who honestly receives a chattel with consent of the true owner can not be found guilty of larceny. Larceny by common law is felonious taking and carrying away from a person. It must be felonious, and this intent to steal must be when it comes to his hand. There must be an actual taking. Hawkins, in his "Pleas of the Crown," adopts Coke's definition of larceny. We are not here concerned with what the law of dishonesty is; the severity of

the ancient criminal law led to the distinction I refer to, but still the principle of law remains today the same. Where no trespass is there is no larceny at common law. Here there was no trespass. Leigh gave Hehir two notes, £1 and £10. He intended to give Hehir the property in one of the notes; what difference is there from the giving of the other note at the same time? Hehir had no *animus furandi* when he took the notes and obtained possession of them.

ANDREWS, J., said: I think the conviction ought to be quashed. I think the property in the note immaterial in this case; no doubt it did not pass to the prisoner. When Leech handed the notes to Hehir he intended to give Hehir possession of the thing he handed. His intention arose from mistake; that does not show that the intention does not exist. In fact, he handed the note to Hehir, knowing that he was handing it to him. A man can take and be in possession of a chattel of which he does not know the value, or believes it to be of a different value or quality from its real value or quality. As regards taking, it is an absolute fiction to say that, although Hehir actually took the note when handed to him, he did not then take it, but only at a subsequent time when he discovered it was something different, and that he then took it, when he really did not take it at all, for he had it for some time in his possession. This is to ignore the actual taking, and make a mere movement of the mind amount to an actual taking. At the time Hehir received possession of the note he got lawful possession of it, and committed no trespass whatever. He took the £10 note innocently and with the consent of the owner, not fraudulently; therefore he is not guilty of larceny. In *Reg. v. Ashwell* the conviction was not affirmed, but stood merely because it was not quashed. It is for the legislature to make this transaction larceny.

O'BRIEN, J., said: The question of consent did not exist in the owner's mind as to the £10. By his own act he put it into the possession of Hehir. The latter was not guilty of larceny. In order to make him out so, we must hold that he "feloniously took," when in fact he did not take at all. We must invent a new criminal category; he is a "finder-out," by an operation of the mind. The *asportavit* disappears altogether in this case. The corporal transfer can not be left out in the idea of larceny. What was the position of Hehir between the taking of the article and the discovery of the mistake by him? Excusable detention, I suppose. He is then a party innocent at first, and afterwards guilty. I do not consider that *Reg. v. Ashwell* levels all the previous cases. It was a divided judgment. No crime has been committed in this case, only a moral transgression, as to which the law has not hitherto given effect to the views of those who think to compass the sea by under-

taking to push the confines of crime into the boundless regions of dishonesty. The conviction should be reversed.

PALLES, C. B., said: I admit that the act of the prisoner in this case was a dishonest one, but it is punishable not by the judges but by the legislature. *Reg. v. Mucklow*, *Reg. v. Davies*, and *Reg. v. Middleton* are all against the conviction. *Reg. v. Ashwell* said the two first were overruled. In it the opinion of seven judges was adverse to a conviction in a case like the present. For fifty-eight years there was an unbroken series of decisions that acts similar to that of the prisoner were not larceny. In *Reg. v. Ashwell* a technical rule maintained the conviction. *Cartwright v. Green* and *Merry v. Green*, cited for the crown, are civil cases. I doubt the right of the Court for the Crown Cases Reserved in England to reverse a previous decision of their own court in a previous case. There is no inconsistency between these two civil cases (neither of which was decided by a court of equal authority with that of the Court for Crown Cases Reserved) and the criminal cases. In both the bailor and bailee were ignorant of the existence of the chattel. There was no intentional manual delivery of the chattel. There was that knowledge in the present case. *Reg. v. Ashwell* has not a single prior case to support it. It was a case of first impression. The ground upon which it was arrived at is given in the judgment of Coleridge, C. J., in whose mind there must have been some serious misapprehension. I hold that it would not be competent to the court in England to uphold the conviction in *Reg. v. Ashwell*, and it is only by following that case that it can be upheld in the present case. As regards written contracts, see *Scott v. Littledale* (8 E. & B. 815). In written instruments the intention must be gathered from the writing. Why should a man not be held to intend that which is the consequence of his act? So long as Hehir believed the note to be for £1 the prosecutor can not be heard to say that he had not the intention of parting with it, and till the discovery of the mistake Hehir had lawful possession of it. There is no difference between the case here and that of a person counting notes and giving nine notes instead of ten. Hehir might lawfully detain the £10 note till he had an opportunity of changing it and giving back £9 to Leech. Hehir must have had lawful possession antecedent to the discovery of the mistake, and that discovery can not by relation back change the character of the antecedent possession, which was Hehir's possession, into that of Leech. Hehir was not guilty of larceny at common law.

SIR PETER O'BRIEN, BART., C. J., in agreeing with the Chief Baron, referred to *Reg. v. Flower*, and said: The innocent receipt of a chattel and its subsequent appropriation does not constitute larceny. Leech gave unreservedly, Hehir honestly received. The fact of his mistaken belief made Leech give the note without any

reservation whatever. *Reg. v. Mucklow* was recognized in *Reg. v. Davies*, although not argued at the bar. It was a moot point among the judges. It is not consistent with *Cartwright v. Green*. There was here no felonious taking. However we dislike the law, we must follow it.

The conviction was accordingly quashed.⁵⁶

(G) LARCENOUS INTENT.

"Lord Coke, and after him most others, have defined simple larceny to be the felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another, neither from the person, nor by night in the house of the owner. Perhaps it may with as much propriety be defined at large to be the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner. Thus Bracton defines it to be *contrectatio rei alienae, fraudulenter, cum animo furandi, invito illo domino cujus res illa fuerit*. And Mr. Justice Blackstone says that the taking must be felonious, that is, done *animo furandi*, or, as the civil law expresses it, *lucris causa*. On the debate in *Pear's case*, Eyre, B., defined larceny to be "the wrongful taking of goods with the intent to spoil the owner of them *causa lucris*." 2 East P. C. 553.

REX v. CABBAGE.

1815. CROWN CASE RESERVED. Russell & Ryan C. C. 292.

The prisoner was tried before Thomson, C. B., at the Lent Assizes for the County of Lancaster in the year 1815, on an indictment for feloniously stealing, taking and leading away a gelding, the property of John Camplin.

The second count charged the prisoner with feloniously, unlawfully, wilfully, and maliciously killing and destroying a gelding, the property of the said John Camplin, against the statute, etc.

The counsel for the prosecution elected to proceed upon the first count.

⁵⁶ Accord: Holding that where the defendant learns of the overpayment subsequent to the receipt of the money, his appropriation is not larceny. *Cooper v. Commonwealth*, 110 Ky. 123, 22 Ky. L. 1627, 60 S. W. 938, 22 L. R. A. 136, 96 Am. St. 426; *Bailey v. State*, 58 Ala. 414.

It appeared that the gelding in question was missed by the prosecutor from his stables on Monday, the 28th February, 1815. The stable door, it appeared, had been forced open. The prosecutor went the same day to a coal-pit, about a mile from the stable, where he saw the marks of a horse's feet. This pit had been worked out and had a fence around it to prevent persons from falling in; one of the rails of this fence had been recently knocked off; a man was sent down into the pit and he brought up a halter, which was proved to be the halter belonging to the gelding. In about three weeks after the finding of the halter, the gelding was drawn up from the coal-pit in the presence of the prosecutor, who knew it to be his. The horse's forehead was very much bruised, and a bone stuck out of it. It appeared that at the time this gelding was destroyed a person of the name of Howarth was in custody, for having stolen it in August, 1813, and that the prosecutor, Camplin, had recovered his gelding again about five weeks after it was taken. Howarth was about to take his trial for this offence when the gelding was destroyed in the manner stated. The prisoner, Cabbage, was taken into custody on the 27th March, 1815, and on his apprehension he said that he went in company with Ann Howarth (the wife of Howarth who was tried for stealing the said gelding) to Camplin's stable door, and that they together forced open the door, and brought the horse out. They then went along the road till they came to the coal-pit before mentioned, and there they backed the horse into the pit.

It was objected by the prisoner's counsel that the evidence in this case did not prove a larceny committed of the horse; that the taking appeared not to have been done with intention to convert it to the use of the taker, "*animo furandi et lucri causa*."

THOMSON. C. B., overruled the objection, and the prisoner was convicted upon the first count of the indictment for stealing the horse. Judgment was passed on him, but the learned Chief Baron respited the execution to take the opinion of the judges as to the propriety of the conviction.

In Easter term, 1815, the judges met to consider this case, and the majority of the judges held the conviction right. Six of the learned judges, viz., Richards, B., Bayley, J., Chambre, J., Thomson, C. B., Gibbs, C. J., and Lord Ellenborough, held it not essential to constitute the offence of larceny, that the taking should be *lucri causa*; they thought a taking fraudulently, with an intent wholly to deprive the owner of the property, sufficient; but some of the six learned judges thought that in this case the object of protecting Howarth by the destruction of this animal might be deemed a benefit or *lucri causa*. Dallas, J., Wood, B., Graham, B., Le Blanc, J., and Heath, J., thought the conviction wrong.

REGINA v. BEECHAM.

1851. OXFORD CIRCUIT. 5 Cox Cr. C. 181.

The indictment in the first count charged the prisoner with the larceny, on the 8th of February, 1851, of three railway tickets of the value of six pounds three shillings, and three pieces of paste-board of the value of one penny, the property of the London and North Western Railway Company.

In a second count, the tickets were described as the property of the station-master at the Banbury-road station.

It appeared in evidence that the prisoner was employed by the railway company as a porter in the goods department of the Banbury-road station. On the evening of the 8th of February, he was drinking beer at the station with a witness of the name of Hazell, who was a horsekeeper employed at the station by an innkeeper. The station clerk, having about half-past eight o'clock in the afternoon, left his office to work the electric telegraph in another compartment of the station, the prisoner went into the ticket office, took out three first-class tickets for the journey from Banbury-road station to York, and stamped them in the machine for the "8th February." The last train for York for that day had been despatched a considerable time, and the prisoner tried to alter the stamping machine so as to re-stamp the tickets with another date, but failed in the attempt. He then gave one of the tickets to Hazell, saying, "There, you fool, when you want to go a long journey, you need not pay; come here and do this."

Hazell mentioned the circumstance on the following day to the station-clerk, who went to the prisoner and taxed him with the offence, saying: "You have railway tickets in your pocket." The prisoner at first denied it, then said if he had them he did not know it, and eventually took the two tickets from his pocket. He immediately afterwards went to the station-master and told all the matter to him. The latter said the prisoner should pay for the tickets or be reported. A few days afterwards he was suspended from his employment and given into custody on this charge. It appeared in evidence that tickets stamped for one day might be restamped for another day and so become available.

At the close of the case for the prosecution.

Williams (for the prisoner) submitted that the second count of the indictment could not be sustained. The station-master had no property in the tickets, as he was the servant of the railway company, and merely had the custody of the tickets.

PATTESON, J., expressed his assent to that proposition.

Williams then objected with respect to the first count, that, as the prisoner must have intended, supposing he took the tickets

with a view to their use, that they should be returned to the company at the end of the journey, there was no such absolute taking away without an intention of restoration as was necessary to constitute a felony.

PATTESON, J., said his opinion was that it was a question for the jury to say whether the prisoner took the tickets with an intention to convert them to his own use and defraud the company of them.

Williams then addressed the jury, submitting to them that the prisoner took the tickets in a foolish, incautious way as a joke, and without any intention whatever to defraud the company.

The learned judge, in summing up, told the jury that if the prisoner took the tickets with intent to use them for his own purposes, whether to give to friends, or to sell them, or to travel by means of them, it would not be the less larceny though they were to be ultimately returned to the company at the end of the journey.

Verdict, not guilty.

REGINA v. RICHARDS.

1844. MONMOUTH ASSIZES. 1 Car. & K. 532.

Larceny.—The prisoner was indicted for stealing iron, the property of William Williams and others, his masters.

The iron alleged to have been stolen was an iron axle of a tram wagon, and it was proved that the prisoner was employed as a puddler by the prosecutors, who were partners in an iron company; and that the puddlers employed by the company were in the habit of receiving a certain quantity of pig iron which they were to put into the furnaces, and they were paid for their work according to the weight of the iron drawn out of the furnace and formed into puddle bars. The prisoner was detected by the foreman of the works in putting an iron axle, belonging to the company (which was not pig iron) into the furnace with the pig iron. The foreman stated that the value of the axle to the company was about 7s., and he had calculated that the gain to the prisoner by putting it in the furnace and melting it would be, according to the mode adopted for paying for the work, a fraction more than a penny.

TINDAL, C. J.—I doubt whether the act of the prisoner, though unquestionably fraudulent and wrongful, comes within the definition of a larceny, as the iron was to come back to the owners in the same substance, though in another form.

G. K. Rickards, for the prosecution.—In the case of *Rex v. Morfit, R. & R. C. C. 307*, it was held that a servant's clandestinely taking his master's corn to give to his master's horse is felony; and

in the case of *Rex v. Cabbage*, R. & R. C. C. 292, where the prisoner forced open a stable door, and took out a horse and led it to an old coal pit, and there backed it down and killed it, the object being that the horse might not contribute to furnish evidence against another person, named Howarth, who was under the charge of stealing it. The judges held that this was larceny, although the prisoner had no intention of deriving any pecuniary benefit from taking the horse.

TINDAL, C. J.: I shall leave it to the jury to say whether the prisoner put the axle into the furnace with a felonious intent, to convert it to a purpose for his own profit; for, if he did so, this was a larceny.

His lordship left the question to the jury.

Verdict, guilty,

REGINA v. BAILEY.

1872. CROWN CASE RESERVED. L. R. 1 C. C. 347.

It was proved that two actions had been brought in the county court against the prisoner, in each of which judgment had been given against him, and a warrant of execution issued against his goods. The high bailiff of the court made the levy under these warrants, and having done so, he handed the warrants over to his deputy bailiff and left him in possession of the goods.

The prisoner, a day or two afterwards, forcibly took the warrants out of the bailiff's hands and kept them. He then ordered him away as having no authority to remain there any longer, and on his refusal to go forcibly turned him out. * * *

COCKBURN, C. J.⁵⁷—I think the first count, charging larceny, will not hold. It is clear that the prisoner took the warrants from the bailiff, thinking that his authority depended on his possession of the warrants, and that by taking them away he would put an end to the authority. But this was not done *animo furandi*; it was not done *lucri causa*. It was no more stealing than it would be to take a stick out of a man's hand to beat him with it. * * *

⁵⁷ Part of the case is omitted.

CANTON NATIONAL BANK v. AMERICAN BONDING
AND TRUST CO.1909. COURT OF APPEALS OF MARYLAND. 111 Md. 41, 73 Atl. 684,
18 Ann. Cas. 820.THOMAS, J., delivered the opinion of the court.⁵⁸

This suit was brought by the Canton National Bank against the American Bonding and Trust Company on a surety bond to recover losses suffered by the plaintiff through its cashier, John W. H. Geiger. * * *

By the terms of the bond the losses which the defendant undertakes to make good are limited to those occasioned by such acts of the cashier as amount to embezzlement or larceny, and the contention of the appellee in this court is that the several acts of the cashier set out in the declaration, and not claimed to be embezzlement, do not amount to larceny. The first inquiry, therefore, is, What is larceny?

In 2 Russell on Crimes 1 (6th Am. ed.) it is said that: "In a late work of great learning and research, larceny is defined at large to be 'the wrongful and fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.'" In 1 Wharton's Crim. Law, § 862 (8th ed.), where the definitions given by Baron Parke, Coke, Hawkins, and Blackstone are criticised, larceny is said to be "the taking and carrying away of a thing unlawfully and without claim or right with the intention of converting it to a use other than that of the owner," and in 2 Bishop's New Crim. Law, § 758, larceny is defined as "the taking and removing by trespass of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive the owner of his ownership therein; and, perhaps it should be added, for the sake of some advantage to the trespasser—a question on which the decisions are not harmonious."

These learned authors agree that even where it is held that the taking must be *lucri causa*, it is not necessary that the motive should be one of pecuniary gain; any advantage to the prisoner is sufficient; and they cite authorities to the effect that to take to give away is larceny. 1 Wharton's Crim. Law, § 896; 1 Russell on Crimes 2; 2 Bishop's New Crim. Law, §§ 840-849. While it is intimated in State v. Hodges, 55 Md. 127, that the taking must be *lucri causa*, and in the case of Worthington v. State, 58 Md. 403, larceny is

⁵⁸ Part of the opinion is omitted.

said to "consist in the wrongful taking and carrying away the chattels of another with a felonious intent to convert them to the taker's own use," in the recent case of *Williams v. U. S. Fidelity Co.*, 105 Md. 494, this court said that "Larceny, at common law, was the felonious taking of the property of another against his will with the intent to convert it to the use of the taker or, as some authorities hold, the use of the taker or a third person." Mr. Bishop says (vol. 2, § 846) that the English courts have at last overthrown the old notion of *lucri causa*. In the case of *Reg. v. White*, 9 C. & P. 344, the prisoner, White, was charged with larceny, and the prisoner, Sellers, was charged with receiving, etc., and Erskine, J., said: "If the prisoner, Eliza White, took the property and handed it to the other prisoner, as a gift, it was as much a felony as it would have been if she had sold it. The purpose for which she took it is not material." The case of *Reg. v. Privett*, 2 C. & K. 144, goes to the full extent of holding that it is not necessary that the prisoner should have intended to derive some benefit or gain to himself. In that case the jury found that the prisoners took the oats from their master with the intent to give them to their master's horses, and without any intent to apply them to their private use, and Earle, J., reserved the case for the fifteen judges, who held the conviction of larceny right. In 25 Cye. 52, it is said that: "According to the weight of authority the felonious intent required for larceny is not necessarily an intent to gain advantage for defendant; an intention to deprive the owner of his property is enough," while in 18 Am. & Eng. Encyc. of Law 504 (2d ed.) the preponderance of authority is said to be the other way, but that "It is not necessary that the benefit should be of a pecuniary nature—it is sufficient that he intended to exercise proprietary rights to the permanent deprivation of the real owner, as where the purpose of the taking was to convert the thing taken to the use of a third person or merely in order to make a gift to a third person."⁵⁹ * * *

WILSON v. STATE.

1885. COURT OF APPEALS OF TEXAS. 18 Tex. App. 270,
51 Am. Rep. 309.

WHITE, PRESIDING JUDGE.⁶⁰—On the motion for a new trial it was urgently insisted that the verdict was contrary to the evidence. To illustrate this position a brief summary of the facts is

⁵⁹ See the following cases, holding that the taking need not be *lucri causa*. *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098; *People v. Juarez*, 28 Cal. 380; *Warden v. State*, 60 Miss. 638; *State v. Wellman*, 34 Minn. 221, 25 N. W. 395; *Williams v. State*, 52 Ala. 411; *Best v. State*, 155 Ind. 46, 57 N. E. 534; *State v. Slingerland*, 19 Nev. 135, 7 Pac. 280.

⁶⁰ Statement of facts is omitted.

necessary. Defendant was indicted for a burglarious breaking, in the night time, of the blacksmith shop of one Broughton, with the fraudulent intent to steal certain corporal personal property contained in said house, belonging to the said Broughton. It was shown by the evidence that the door of the blacksmith shop had been broken, and that the burglar after entry had broken open a chest in the shop and taken therefrom a brace. On the same night the storehouse of one Brown had been burglarized, his safe blown open, and several hundred dollars abstracted therefrom. So strong is the evidence that there can scarcely be a shadow of doubt but that defendant and another party broke into the blacksmith shop, took the brace, then went to Brown's store, entered that, broke open the safe and stole the money. Near Brown's store, lying under a wagon, the next morning after the burglaries, Broughton found his brace which had been stolen from the blacksmith shop.

It is contended that this state of facts shows that, though defendant broke into the blacksmith shop and took the brace, he was not guilty of the theft of the brace, because his intention in taking it was not to appropriate it permanently, but only to use it temporarily in the breaking into the safe of Brown, and that after he had accomplished that temporary purpose for which he had taken it, he had left or abandoned it where found.

In his charge to the jury the learned judge did not submit the issue to the jury as to whether or not the brace was taken from the blacksmith shop with a view to a permanent appropriation or a mere temporary use of it. No exception was taken to the charge as given, nor was any instruction specially requested of the court, and the point raised was not made until it was presented in the motion for a new trial. If the matter, however, was part of the law made necessary by the facts that it should be given, then and in such case the omission to charge upon that phase of the case would be reversible error, even though the charge was not excepted to nor special instructions upon the point requested; because in felony cases the charge must "distinctly set forth the law applicable to the case," "whether asked or not." (Code Crim. Proc., art. 677.)

What is the law? Mr. Wharton says "it should be remembered that every taking of the property of another without his knowledge or consent does not amount to larceny. To make it such it must be accompanied by circumstances which demonstrate a felonious intention to deprive the possessor permanently of the thing taken." (1 Whart. Crim. L. (8th ed.) 883.) In *Johnson v. The State*, 36 Texas 375, it was held that in order to constitute the crime of larceny the taking of the property must be with the felonious intent of permanently depriving the owner of his property, and the same doctrine was again held by our supreme court in *Blackburn v. The State*, 44 Texas 457, and in *Rodrigues v. The State*,

decided 30th April, 1875, and by this court in *Loza v. The State*, 1 Texas Ct. App. 488.

In *Rex v. Crump*, 2 Carrington & Payne (12 Eng. C. L.) 372, it was held that if a person stealing other property take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony.

In theft the taking must be with fraudulent intent; must be to "deprive the owner of the value of the same and appropriate it to the use or benefit of the person taking." (Penal Code, art. 745.) If the intent to deprive the owner of it is wanting, the offense is not theft. Mr. Archbold defined a larcenous intent at common law thus: "Where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use." And Chief Justice Eyre in *Pear's case* defined the offence thus: "The wrongful taking of goods with intent to spoil the owner of them *lucri causa*." (State v. Shermer, 55 Mo. 83.)

Whether the taking was fraudulent or not depends in all cases upon the intent or the purpose with which the property was taken, and that intent is to be determined by the jury upon all the facts and circumstances of the case. Upon this point Mr. Archbold says: "In all cases of larceny the questions whether the defendant took the goods knowingly or by mistake; whether he took them *bona fide* under a claim of right or otherwise; and whether he took them with intent to return them to the owner, or to deprive the owner of them altogether and to appropriate or convert them to his own use, are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case." (2 Archb. Crim. Pr. & Pl. (8th ed.), p. 1184. See, also, *Hart v. The State*, 57 Ind. 102; *State v. Hawkins*, 8 Porter (Ala.) 461; *Phelps v. The People*, 55 Ill. 334; *State v. Scott*, 64 N. C. 586.)

In *Fields v. The State*, 6 Cold. (Tenn.) 524, it was held that to constitute larceny the taking must be without color of right and to deprive the owner permanently of his property. And in that case, which was for theft of certain tools pawned by defendant for whisky, it is said, "the court correctly stated to the jury that the taking must be done without the least color of right or excuse for the act, and with intent to deprive the owner not temporarily but permanently of his property."

In *Blackburn's case*, already cited above from 44 Texas 457, Chief Justice Roberts says: "The charge of the court should further have submitted the question under the evidence to the jury whether Blackburn took the horse to use him temporarily as an estray, or to make property of him by converting him to his own use as a permanent appropriation."

In the case we have in hand it was an issue in the case, made by

the facts proved, whether the taking of "the brace" from the blacksmith shop of Broughton was for a mere temporary use or for a permanent appropriation. It was in fact the only issue raised by the evidence. Defendant had the right to have it submitted to the jury for their determination, and it was not for the court to ignore it in his charge. It may be said that its submission to the jury would not have affected the result in so plain a case. Perhaps so, but it is not for us to say or presume what might or might not have been the result of such a charge. We are not authorized to presume anything in favor of a charge in a felony case which does not "distinctly set forth the law applicable to the case." The last legislature were asked to confer upon this court some authority, where in our opinion the rights of a defendant could not have been injured, in matters of error committed in the charge (See Attorney-General's Report, 1884, p. 19), and the legislature declined to make any changes in the law as it is.

Because the charge of the court did not present the law applicable to the case, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.⁶¹

(H) FORMS OF LARCENY.

STATE v. CHAMBERS.

1883. SUPREME COURT OF APPEALS OF WEST VIRGINIA.

22 W. Va. 779, 46 Am. Rep. 550.

WOODS, J.⁶²—* * * At the common law, larceny is distinguished into two sorts, the one called simple larceny, or plain theft

⁶¹ Accord: Holding that taking goods for temporary use is not larceny. *United States v. Durkee*, 1 McAll. (U. S.) 196, Fed. Cas. No. 15009; *Bailey v. State*, 92 Ark. 216, 122 S. W. 497 (seizing weapon for use in self-defense); *Umphey v. State*, 63 Ind. 223; *State v. Shermer*, 55 Mo. 83; *In re Mutchler*, 55 Kans. 164, 40 Pac. 283; *State v. South*, 28 N. J. L. 28, 75 Am. Dec. 250; *People v. Brown*, 105 Cal. 66, 38 Pac. 518; *Parr v. Loder*, 97 App. Div. (N. Y.) 218, 89 N. Y. S. 823; see, also, cases in 25 Cyc. 52, n. 52. Whether taking goods and pawning or pledging them, although with the intent to redeem them, is larceny, see *Reg. v. Phetheon*, 9 Car. & P. 553; *Reg. v. Medland*, 5 Cox Cr. C. 292; *Reg. v. Trebilcock*, 7 Cox Cr. C. 408; *Reg. v. Wynn*, 16 Cox Cr. C. 231; *Blackburn v. Commonwealth*, 28 Ky. L. 96, 89 S. W. 160. Taking goods under a bona fide, but mistaken, claim of right is not larceny. See 25 Cyc. 49, n. 32. Taking goods to force the payment of a debt is not larceny, where the taking is under a bona fide claim of right. *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492; *Johnson v. State*, 73 Ala. 523. Taking goods to claim a reward when offered is larceny. *Reg. v. O'Donnell*, 7 Cox Cr. C. 337; *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; *Commonwealth v. Mason*, 105 Mass. 163, 7 Am. Rep. 507.

⁶² The statement of facts, and part of the opinion are omitted.

unaccompanied with any other atrocious circumstances; and mixed or compound larceny—which also includes in it the aggravation of a taking from one's house or person. 4 Bl. Com. 229; 2 East P. C., ch. 16, §§ 1, 118. Larceny from the person is either by privately stealing, or by open and violent assault, which is usually called robbery. Privately stealing from the person, as by picking his pocket or cutting his purse, was not otherwise regarded or punished by the common law than as simple larceny, until the Statute of 8 Elizabeth (chap. 4), when, to more effectually suppress the cutting and picking of purses, it was enacted "that no person indicted or appealed for felonious taking of any money, goods or chattels from the person of any other privily without his knowledge⁶³ in any place whatsoever; and thereupon found guilty by verdict or shall confess the same upon his arraignment, * * * shall be admitted to the benefit of clergy and shall suffer death."⁶⁴ Under this statute it was held that there must have been an actual taking from the person; a taking from his presence was not sufficient as it was in robbery. But in order to convict a man of this offense, and inflict the penalty of death, it was necessary that the indictment should lay the offense to have been done privily without the knowledge of the party in exact pursuance of the words of the statute, otherwise the prisoner would have been entitled to his clergy, and so he would have been if the value had not been laid as well as proved to be above twelve pence. East P. C., ch. 16, §§ 122, 123. Simple larceny at common law, as it still is with us, was divided into grand larceny, where the property stolen exceeded in value twelve pence, and into petit larceny where the value was twelve pence or under, but both were felonious, and were distinguished by the punishments inflicted, that of grand larceny being death, and of petit larceny whipping or some corporal punishment. To many felonies at common law, the benefit of clergy attached, whereby the party convicted thereof was for the first offence exempted from capital punishment, but it was never allowed in high treason, petit larceny, nor any misdemeanor. The benefit of clergy was at first confined to clergymen in a few particular cases, but the exemption was gradually extended, as well in regard to the crimes themselves, of which the list became quite universal, as in regard to the persons exempted, until it included every one who could read, while the ignorant and unlearned were left to be hanged for the commission of the same crimes, for which those who could read suffered the slight punishment of being burned in the hand. By the statute 6 Ann, ch. 6, the benefit of clergy was extended to every one entitled to ask it, without requiring them to read, by way of conditional merit. 4 Bl. Com. 370-374. In

⁶³ Under 48 Geo. III, ch. 129, § 2, it was no longer required that the theft be "privily without his knowledge."

⁶⁴ See 24 and 25 Vict., ch. 96, § 40, a later statute.

nearly all felonies, including grand larceny, the convicted felon was entitled to the benefit of clergy, and Blackstone, in his *Commentaries*, lays it down as a rule that in all felonies, whether new created, or by common law, clergy is now allowed unless taken away by express words of act of Parliament. 4 Bl. Com. 373. When, therefore, the statute of 8 Elizabeth deprived those of the benefit of clergy who were convicted by verdict, etc., of feloniously taking money or goods from the person of another privily without his knowledge, it vastly increased the punishment, but did not alter the nature of the felony. Hale P. C. 529. It is therefore apparent that every larceny committed privily from the person of another without his knowledge necessarily included the simple larceny of the same, money or goods, for stealing which, if not so taken from the person, the thief would have been entitled to the benefit of clergy. But in order to deprive the thief of the benefit of clergy, and to inflict the punishment of death for the first conviction of grand larceny, it was necessary to allege in the indictment, and prove upon the trial, that the property taken exceeded in value twelve pence; that it was not only feloniously taken, but that it was so taken from the person of the owner privily and without his knowledge; in other words, it was necessary to allege and prove every act, fact and intent necessary to convict the prisoner of the simple larceny of the same goods, and in addition thereto to allege and prove that the said goods "had been feloniously taken from the person of the owner, privily and without his knowledge"; and so the thief might be guilty of the simple larceny of the goods, yet not be guilty of the larceny thereof from the person of the owner; but if guilty of the latter offense, he was necessarily guilty of the simple larceny of the same goods. It must be borne in mind that said statute of 8 Elizabeth, does not use the term "larceny" nor its equivalent, "feloniously taking and carrying away," but uses only the words "feloniously taking of any goods, etc., from the person of any other privily," etc. While the statute was not intended to create a new offense, it did intend that the terms, "taking from the person," although less comprehensive in their signification, should in such cases be held as equivalent to the terms "taking and carrying away." A statute of similar import dispensing with the necessity of alleging or proving the "carrying away of goods," when the theft is committed by privately stealing from the person of another, exists in the State of Texas, which expressly declares that the theft must be from the person and committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away." R. S., ch. 10 of Penal Code. For simple larceny, another chapter of said Penal Code provides a heavier penalty. In the State of New York a statute has for many years been in force which imposes upon a

party convicted of larceny from the person the same punishment imposed for grand larceny, whatever may be the value of the property so stolen. 3 R. S. N. Y., p. 953, § 81. From what has been said, it follows that wherever the common law is in force, and no statute exists prescribing a different punishment for larceny from the person from that for other larcenies, all larcenies from the person become simple larcenies, and whether such statutes exist or not, all offenders guilty of larcenies from the person may nevertheless be indicted for the simple larceny included therein, and they must be so tried unless specially indicted under and in pursuance of such statutes. Where no such statute exists, the distinction between larceny from the person and other larceny does not exist, and every larceny not rising to the grade of robbery becomes simple larceny. In this state no such statute exists, and all larcenies not rising to the crime of robbery are simple larcenies, and punishable in the same manner.⁶⁵ * * *

COMMONWEALTH v. HARTNETT.

1885. SUPREME JUDICIAL COURT OF MASSACHUSETTS.

3 Gray (Mass.) 450.

Indictment on St. 1851, ch. 156, § 4, for larceny in a building of Timothy Hartnett. At the trial in the municipal court it appeared that the said Timothy was the husband of the defendant; and the defendant contended that she could therefore be convicted of simple larceny only. But Hoar, J., ruled that the evidence was sufficient to sustain the charge of larceny in a building. And to this ruling the defendant, being found guilty, alleged exceptions.

METCALF, J.—The defendant is convicted of larceny in a building owned by her husband; and as the indictment does not aver that it was committed in the night time, it must be taken to have been committed in the day time. St. 1843, ch. 1, § 2. The question is, whether the defendant is liable to the punishment prescribed by St. 1851, ch. 156, § 4, for larceny "in any building," or only to the punishment elsewhere prescribed for simple larceny.

Larceny in the daytime, in a dwelling-house and in certain other buildings, not broken into, was first subjected, in Massachusetts, to greater punishment than if not committed therein, by St. 1804, ch. 143, § 6; to wit, solitary imprisonment of the offender, in the state

⁶⁵ In *Reg. v. Selway*, 8 Cox Cr. C. 235, it was held that it was not necessary that the property be in the manual possession of the person from whom it was taken, if under his protection and taken in his presence; see, also, *Clements v. State*, 84 Ga. 660, 11 S. E. 505, 20 Am. St. 385; and *State v. Calhoun*, 72 Iowa 432, 34 N. W. 194, 2 Am. St. 252.

prison, not exceeding six months, and confinement there afterwards to hard labor, not exceeding five years. By St. 1830, ch. 72, § 3, courts were authorized to sentence such offender to confinement in the county jail, not exceeding five years, or to the payment of a fine, according to the nature and aggravation of the offense. By the Rev. Sts., ch. 126, § 14, it was thus enacted: "Every person who shall steal, in the daytime, in any dwelling house, office, bank, shop or warehouse, ship or vessel, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail, not more than two years." By St. 1851, ch. 156, § 4, "every person who shall commit the offence of larceny, by stealing in any building, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars, or imprisonment in the house of correction or county jail, not exceeding three years." For simple larceny, that is, for theft not aggravated by being from the person, nor by being committed in a dwelling-house or other building, ship or vessel, a lighter punishment is prescribed by the Rev. Sts., ch. 126, § 17, and ch. 143, § 5. And we are of opinion that the defendant is liable only to that lighter punishment.

We do not suppose that any English statutes for the punishment of larceny were ever held to be in force in Massachusetts. 7 Dane Ab. 168. Yet the provisions of some of them, and the provisions of acts of parliament for the punishment of other offenses, have been enacted by our legislature in every stage of our history. And in such cases (as well as in cases where English statutes respecting civil concerns have been enacted here), it has always been held that the construction previously given to the same terms, by the English courts, is the construction to be given to them by our courts. It is a common learning that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act, which has been passed by the legislature of one state or country, is afterwards passed by the legislature of another. So when the same legislature, in a later statute, uses the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention. 6 Dane Ab. 613; *Kirkpatrick v. Gibson's Exrs.*, 2 Brock. 388; *Pennock v. Dialogue*, 2 Pet. 18; *Adams v. Field*, 21 Vt. 266; *Whitcomb v. Rood*, 20 Vt. 52; *Rutland v. Mendon*, 1 Pick. 156; *Myrick v. Hasey*, 27 Maine 17. There are many instances in which our legislature have made punishable, as offenses, acts which were first made so by English statutes. Among others are our statutes concerning the fraudulent obtaining of money

or goods by false pretenses. In all such cases the construction given by the English courts is deemed to be the true one, when the statutes are alike. And we have already stated that the act of stealing in certain buildings was first made an aggravated larceny, and subjected to a greater punishment than before, by St. 1804, ch. 143. Yet by the English St. 12 Anne, ch. 7 (passed in 1713, and now repealed), it was enacted that "all and every person or persons that shall feloniously steal any money, goods or chattels, wares or merchandises, of the value of forty shillings or more, being in any dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons, be or be not in such house or outhouse, being thereof convicted, shall be absolutely debarred of and from the benefit of clergy."⁶⁶ And by the English St. 24 Geo. II, ch. 45, a like provision was made in cases of conviction of the offense of feloniously stealing goods, wares or merchandise of the value of forty shillings, in any ship, barge, lighter, boat or other vessel, upon any navigable river, or in any port of entry or discharge. But it was early decided that the first of these statutes did not extend to a stealing by one in his own house, nor to a stealing by a wife in her husband's house, which is the same as her own. The intention of the statute was declared to be to protect the owner's property in his own house from the depredation of others, or the property of others lodged in his house; thereby giving protection against all but the owner himself. It has also been decided that the property stolen must be such as is usually under the protection of the house, deposited there for safe custody, and not things immediately under the eye or personal care of some one who happens to be in the house. 2 East P. C. 644-646; *The King v. Gould*, 1 Leach (3d ed.) 257; *The King v. Thompson & Macdaniel*, 1 Leach 379; *The King v. Campbell*, 2 Leach 642. See, also, *Rex v. Taylor*, Russ. & Ry. 418; *Rex v. Hamilton*, 8 Car. & P. 49; *Rex v. Carroll*, 1 Mood. C. C. 89. And it has also been held that the St. 24 Geo. II, ch. 45, does not extend to stealing by the owner and master of a vessel. *Rex v. Madox*, Russ. & Ry. 92.

We are of opinion that the purpose and intent of St. 1804, ch. 143, § 6, and of the Rev. Sts., ch. 126, § 14, were the same as the purpose and intent of St. 12 Anne, ch. 7, and that they must have the same construction which was given to that before these were enacted. Indeed, the attorney-general frankly admits this, and that he can not ask for sentence against the defendant, as for an aggravated larceny, unless it is required or warranted by St. 1851, ch. 156, § 4. We think that statute has not altered the law in this matter; that it has only made larceny "in any building" an aggravated offense, as former statutes made it when committed in certain

⁶⁶ See 24 and 25 Vict., ch. 96, and 27 and 28 Vict., ch. 47, later statutes.

enumerated buildings; and that it has not subjected to the punishment therein prescribed any larceny which, if committed in either of those buildings, would not have been liable to such punishment. The statute was passed in consequence of the decision, in *Commonwealth v. White*, 6 Cush. 181, that the passenger room of a railroad station was not an "office," within the meaning of the Rev. Sts., ch. 126, § 14.

Defendant to be sentenced for simple larceny.⁸⁷

Section 2.—Embezzlement.

REGINA v. CULLUM.

1873. CROWN CASE RESERVED. L. R. 2 C. C. 28.

Case stated by the chairman of the West Kent Sessions.

The prisoner was indicted, as servant to George Smeed, for stealing £2, the property of his master.

The prisoner was employed by Mr. Smeed, of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo, and from such persons, as his master should direct. The prisoner had no authority to select a return cargo, or take any other cargoes but those appointed for him. The prisoner was entitled, by way of remuneration for his services, to half the earnings of the barge, after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed and asked if he should not on his return take a load of manure to Mr. Pye, of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston. Going from London to Murston, he would pass Caxton. Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to

⁸⁷ Clothes and money placed by the bedside, money in a trunk, and the key in the pocket of one's clothes, are under the protection of the house and not of the person, while sleeping. *Rex v. Thomas*, Car. Cr. L. 295; *Rex v. Hamilton*, 8 C. & P. 49; *Commonwealth v. Smith*, 111 Mass. 429; see, also, *People v. McElroy*, 116 Cal. 583, 48 Pac. 718, where it was held that the theft of money placed under the pillow is not larceny from the person under the California statute.

Mr. Pye, at Caxton, and received from Mr. Pye's men £4 as the freight. It was not proved that he had professed to carry the manure or to receive the freight for his master. The servant who paid the £4 said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom. Early in December the prisoner returned home to Sittingbourne and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the £4 received from Mr. Pye for the freight for the mandre.

The jury found the prisoner guilty, as servant to Mr. Smeed, of embezzling £2.

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement. * * *

BOVILL, C. J.⁶⁸—In the former act relating to this offense were the words "by virtue of his employment." The phrase led to some difficulty, for example, such as arose in *Reg. v. Snowley*, 4 C. & P. 390, and *Reg. v. Harris*, Dears. Cr. C. 344. Therefore in the present statute those words are left out; and § 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money or valuable security * * * shall be delivered to; or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's order, used the barge for his, the servant's, own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances, the money would not be received "for," or "in the name of," or "on account of," his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.

Conviction quashed.⁶⁹

⁶⁸ Colloquy of court and counsel, and concurring opinions of Bramwell, B., Blackburn, J., and Archibald, J., are omitted. Honyman, J., concurred.

⁶⁹ In 2 Russell on Crimes (6th ed.), p. 341, the author says: "The words of the former enactments were, 'shall by virtue of such employ-

COMMONWEALTH v. HAYES.

1859. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 14 Gray 62,
74 Am. Dec. 662.

Indictment on St. 1857, ch. 233, which declared that "if any person, to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, shall embezzle, or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of simple larceny." The indictment contained two counts, one for embezzlement and one for simple larceny.

At the trial in the court of common pleas in Middlesex, at October term, 1858, before Aiken, J., Amos Stone, called as a witness by the Commonwealth, testified as follows: "I am treasurer of the Charlestown Five Cent Savings Bank. On the 17th day of October, 1857, the defendant came into the bank and asked to draw his deposit, and presented his deposit book. I took his book, balanced it, and handed it back to him. It was for one hundred and thirty dollars in one item. I then counted out to him two hundred and thirty dollars and said: 'There are two hundred and thirty dollars.' The defendant took the money to the end of the counter and counted it, and then left the room. Soon after the defendant had left I discovered that I had paid one hundred dollars too much. After the close of bank hours I went in search of the defendant and told him that I had paid him one hundred dollars too much, and asked him to adjust the matter. The defendant asked me how I knew it. He asked me if I could read. I said 'Yes.' He then showed me his book and said: 'What does that say?' I took it and read in it one hundred and thirty dollars. The defendant then said: 'That is

ment, receive or take into his possession any chattels, etc., for or in the name or on the account of his master.' In the present clause the words 'by virtue of such employment' are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The clause is so framed as to include every case where any chattel, etc., is delivered to, received, or taken possession of by the clerk or servant for or in the name or on account of the master. If, therefore, a man pay a servant money for his master, the case will be within the statute, though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession just as much as if it were in my house, or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the term of this clause, so as to make him guilty of embezzlement if he converts it to his own use."

what I got.' He exhibited two fifties, two tens, and a ten-dollar gold piece and said: 'That is what I got.' I then said to him: 'Do you say that is all and precisely what I gave you?' He replied: 'That it what I got.' I then said to him: 'I can prove you got two hundred and thirty dollars.' He replied: 'That is what I want; if you can prove it you will get it; otherwise, you won't.' I intended to pay the defendant the sum of two hundred and thirty dollars, and did so pay him. I then supposed that the book called for two hundred and thirty dollars. Books are kept at the bank containing an account with depositors, wherein all sums deposited are credited to them, and all sums paid out are charged to them."

The defendant asked the court to instruct the jury that the above facts did not establish such a delivery or embezzlement as subjected the defendant to a prosecution under the St. of 1857, ch. 233, and did not constitute the crime of larceny.

The court refused so to instruct the jury; and instructed them "that if the sum of two hundred and thirty dollars was so delivered to the defendant, as testified, and one hundred dollars, parcel of the same, was so delivered by mistake of the treasurer, as testified, and the defendant knew that it was so delivered by mistake, and knew he was not entitled to it, and afterwards the money so delivered by mistake was demanded of him by the treasurer, and the defendant, having such knowledge, did fraudulently, and with a felonious intent to deprive the bank of the money, convert the same to his own use, he would be liable under this indictment." The jury returned a verdict of guilty, and the defendant alleged exceptions.

BIGELOW, J.—The statute under which this indictment is found is certainly expressed in very general terms which leave room for doubt as to its true construction. But, interpreting its language according to the subject-matter to which it relates, and in the light of the existing state of the law, which the statute was intended to alter and enlarge, we think its true meaning can be readily ascertained.

The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust towards their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently con-

verted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation, which is essential to the proof of the crime of larceny. *The King v. Bazeley*, 2 Leach (4th ed.) 835, 2 East P. C. 568.

The statutes relating to embezzlement were intended to embrace this class of offenses; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist. This is the distinguishing feature of the provisions in the Rev. Sts., ch. 126, §§ 27-30, creating and punishing the crime of embezzlement, which carefully enumerate the classes of persons that may be subject to the penalties therein provided. Those provisions have been strictly construed, and the operation of the statute has been carefully confined to persons having in their possession, by virtue of their occupation or employment, the money or property of another, which has been fraudulently converted in violation of a trust reposed in them. *Commonwealth v. Stearns*, 2 Metc. 343; *Commonwealth v. Libbey*, 11 Metc. 64; *Commonwealth v. Williams*, 3 Gray 461. In the last named case it was held that a person was not guilty of embezzlement under Rev. Sts., ch. 126, § 30, who had converted to his own use money which had been delivered to him by another for safekeeping.

The St. of 1857, ch. 233, was probably enacted to supply the defect which was shown to exist in the criminal law by this decision, and was intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently converted by him. But in this class of cases there exists the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safekeeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go. Where money paid or property delivered through mistake has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other. The moral turpitude is therefore not so great as in those cases usually comprehended within the offense of embezzlement, and we can not think that the legislature intended to place them on the same footing. We are therefore of opinion that the facts proved in this case did not bring it within the statute, and that the defendant was wrongly convicted. Exceptions sustained.

COLIP v. STATE.

1899. SUPREME COURT OF INDIANA. 153 Ind. 584, 55 N. E. 739, 74 Am. St. 322.

DOWLING, J.⁷⁰—Information founded upon an affidavit charging appellant with the crime of petit larceny. Trial by jury. Verdict of guilty. Motion for a new trial overruled, and judgment on verdict that appellant be committed to the care and custody of the board of managers of the Indiana Reformatory, etc., that the state of Indiana recover from the appellant the sum of \$1 as a fine, and that he pay all costs, etc.

The only error discussed on this appeal is the ruling of the court on the motion for a new trial. It is insisted that the verdict and judgment, respectively, are "contrary to law" and "contrary to the evidence."

The first point made is that the appellant, if guilty at all, was guilty of the crime of embezzlement and not of larceny. The evidence shows that he boarded and lodged at the residence of the prosecuting witness, on a farm, and that occasionally he did small jobs of work for said witness, such as feeding and caring for live stock, building fences, hauling manure, and the like. During the temporary absence from home of the prosecuting witness, appellant, who remained on the farm with the family of the prosecuting witness, without the knowledge or consent of the prosecuting witness or of any of his family, broke open a large box containing a lot of wheat belonging to the prosecuting witness, and removed some 12 bushels therefrom, which he hauled away and sold. Afterwards, when charged with taking the wheat, he denied it.

Counsel for appellant contends that the appellant was the servant or employé of the prosecuting witness, and that, as such servant or employé, he had access to the wheat, and that his felonious appropriation of the same fell within the provisions of § 2022, Burns' Revised Statutes 1894, defining the crime of embezzlement, the substance of which may be thus stated:

Every servant or employé of any person, who, having access to, control, or possession of any article or thing of value to the possession of which his employer is entitled, shall, while in such employment, take, purloin, secrete, or in any way whatever appropriate to his own use any property or thing of value belonging to, or held by, such person in whose employment said servant or employé may be, shall be deemed guilty of embezzlement, and upon conviction thereof shall be imprisoned, etc.

The access to, control, or possession of property of the servant

⁷⁰ Part of the opinion is omitted.

or employé, intended by the statute, is such access, control, or possession as arises from the nature of the employment, with reference to the particular article of property feloniously appropriated. Something more than mere physical access or opportunity of approach to the thing is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to or control or possession of it.⁷¹ No such relation of trust exists between a farm hand and his employer, with reference to the master's wheat or other farm products with which the servant is not intrusted for the purpose of safe-keeping, carriage, delivery, or sale. If such a servant feloniously purloins, secretes, or otherwise appropriates the property of the master, such taking is larceny, and not embezzlement.

Even where the servant has the care and oversight of property belonging to the master, the felonious appropriation of it by the servant is larceny. The law in such cases is thus stated by an eminent author:

"If a servant who has merely the care and oversight of the goods of his master (as the butler of plate, a messenger or runner of money or goods, a hostler of horses, the shepherd of sheep, and the like) convert such goods to his own use, without his master's consent, this is larceny at common law, because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master.

Thus A, going on a journey, left his shop in the care of the defendant, under the superintendence of A's brother, and the latter, on account of the defendant's drunkenness, dismissed him, and A, on returning, found his goods missing, and, pursuing the defendant, overtook him with some of them in his possession, the court sustained a conviction. * * * The rule may be amplified by saying that where one, having only the charge or custody of property for the owner, converts it, *animo furandi*, it is larceny. * * * A clerk taking money or goods from his employer's safe, till, or shelves, is guilty of larceny, unless it appear that he is specially authorized to dispose of such money or goods at his discretion." Wharton's Criminal Law (8th ed.), §§ 956, 957, 960.

It is said by the same author that: "Embezzlement is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the property of the same. In the common-law definition of larceny, we must remember, there are two gaps through which, in the expansion of business, many criminals escaped.

⁷¹ See also the following cases showing that the accused must receive the property by reason of his employment, or in a fiduciary capacity. *People v. Butts*, 128 Mich. 208, 87 N. W. 224; *Loving v. State*, 44 Tex. Cr. 373, 71 S. W. 277; *State v. Brown*, 171 Mo. 477, 71 S. W. 1031.

The first of these gaps is caused by the position that, to maintain larceny, it is necessary that the stolen goods should have been at some time in the prosecutor's possession. The second results from the assumption that, when possession of goods is acquired *bona fide* by a bailee, no subsequent fraudulent conversion (unless there be breaking of bulk, or some other rupture of the conditions of the bailment) can be larceny, while the bailment lasts. To cure these defects were passed the embezzlement statutes of England and of most of the United States. These statutes were intended simply to establish two new cases of larceny. If a servant (and this is the first of the two) steals his master's goods before they have come into his master's possession, he, the servant, shall be guilty of larceny. And the second is that it shall be larceny for a trustee or bailee to fraudulently convert to his own use his master's goods he may have *bona fide* received. Now, as neither of these cases is larceny at common law, the statutes of embezzlement in no way overlap the old domain of larceny. They were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that is larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law." Wharton's Criminal Law (8th ed.), § 1009 (see, also, §§ 1905, 1924); Bishop on Criminal Law (4th ed.), §§ 326-370; *Marcus v. State*, 26 Ind. 101; *Smith v. State*, 28 Ind. 321. Under these authorities, it seems clear that the appellant was properly charged with the crime of larceny. * * *

Finding no error in the record, the judgment is affirmed.

PEOPLE v. BIRNBAUM.

1906. APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK.
114 App. Div. 480.

Appeal by the defendant, Jacob M. Birnbaum, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 27th day of June, 1904, convicting the defendant of the crime of grand larceny in the second degree, and also from an order bearing date the 5th of July, 1905, and entered in the office of the clerk of said court, denying the defendant's motion for a new trial.⁷²

LAUGHLIN, J.—The defendant is an attorney and counselor-at-law, having been admitted to practice in the year 1900. The indict-

⁷² Part of the opinion is omitted.

ment, in two counts, charged the defendant with grand larceny in the first degree, in that he had in his possession, custody and control, as agent, bailee and attorney, the sum of \$550 belonging to one Harriet Coleman, a client of his, and appropriated the same to his own use, with intent to deprive and defraud her thereof. The first count was withdrawn and he was convicted of the lesser degree under the second count.

The defendant was employed by the complainant to prosecute a claim for damages for personal injuries sustained by her against the Metropolitan Street Railway Company. On the 2d day of April, 1901, the client and attorney made an agreement in writing with respect to his employment and compensation, which, so far as material, provided as follows: "I, Harriet Coleman * * * do hereby agree to give J. Birnbaum the exclusive right (and) power to prosecute my said claim for damages, and the said J. M. Birnbaum hereby agrees to give me 50 per cent. of the net proceeds recovered, and I hereby agree with the said J. M. Birnbaum that he shall retain 50 per cent. of the net proceeds recovered, together with the costs and the counsel fees of the action as allowed by the defendant and the court; said costs (and) counsel fees to be paid by the defendant only and not by the injured party. No settlement of this case to be made in or out of court without the consent of both parties hereto."

The action was brought, and upon the first trial a verdict was rendered in favor of the plaintiff for \$1,925. The judgment entered upon the verdict was reversed upon appeal and a new trial ordered. (*Coleman v. Metropolitan Street R. Co.*, 82 App. Div. 435.) Upon the second trial a verdict was rendered in favor of the plaintiff for \$2,000, and judgment was entered thereon on the 5th day of June, 1903, for the amount of the verdict and \$427.29 costs. The defendant obtained the usual stay and prepared to take another appeal, but subsequently and on the 23d day of September, 1903, the judgment was compromised for \$2,000. Payment was made by a check drawn to the order of "Harriet Coleman or J. M. Birnbaum, atty.," which was delivered to the defendant, who indorsed it and deposited it in his individual bank account to his own credit. On the twenty-eighth day of September the defendant gave his client \$450 in full of her claim.

The People gave evidence tending to show, and sufficient to warrant the jury in finding, that the defendant represented to his client that he had only received in settlement of the judgment the sum of \$1,300. * * *

The appellant presents a serious point upon the merits. He contends that the defendant's client did not own any specific part of the moneys received from the railroad company, and that if she did, it has not been shown that he has either converted or misappropri-

ated it. It is claimed that the agreement between the attorney and client constituted an equitable assignment of one-half the proceeds of the cause of action, and that, therefore, the defendant and his client were co-owners of this fund, and he cites as authority for this proposition the case of *Fairbanks v. Sargent* (117 N. Y. 320), which so holds. It does not follow, however, that merely because the attorney and client each had an equal undivided interest in the fund, the duties and obligations of the defendant as attorney terminated. The relation of attorney and client continued. To the extent of the client's interest the defendant held the money as attorney for her. The relationship of debtor and creditor doubtless existed, but, in addition to that, the relationship of attorney and client existed, and the attorney can not escape his duty or avoid his liability upon the theory suggested.

Section 528 of the Penal Code provides, among other things, as follows: "A person who, with the intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person, either * * * . 2. Having in his possession, custody or control, as a bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold or take such possession, custody or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny."

It is quite clear, I think, that, if it appeared that the defendant checked out the balance of this account and used it in the payment of his individual obligations, he would be guilty of a violation of subdivision 2 of the section of the Penal Code herein quoted. The serious question arises as to whether The People have sufficiently shown that the defendant has appropriated his client's share of this money to his own use. His intent to defraud and deprive her of the use and benefit of the property is clearly established. There could have been no other object in concealing from her the true amount he received in settlement of her case. The client, as she had a right to do, relied implicitly upon the representations of her attorney as to the amount of the settlement. (*Wheaton v. Newcombe*, 48 N. Y. Super. Ct. 215.) It is clear that if he held this money as her attorney and refused to pay it over on demand he would have been guilty of larceny even though it remained in the bank where originally deposited. On the facts here presented a demand therefor by the client upon the attorney and refusal upon his part to pay would have completed the crime. She was deprived

of making a demand by his concealment of the fact that he still retained some of her money and by assuring her that he had fully accounted. The money was deposited to his individual credit. It was, therefore, the same as if in his custody. If at the time of the settlement he retained \$550 or \$350 of his client's money in his pocket and accounted to her for the balance, representing that he had accounted for all that he had received, I think it quite clear that the retention in his possession after such representation, and with the intent clearly shown by such representation to appropriate the balance of the fund to his own use, would constitute an appropriation thereof without any further act and render him guilty of larceny. There is no material difference between his having the money in his pocket at the time of the settlement or leaving it somewhere else with the same intent or leaving it deposited to his individual credit in the bank, checking out and accounting to his client for only part of her share. No case cited appears to be directly in point on these facts. The argument in the opinion in the case of *People v. Civile* (44 Hun 497) tends in the direction of the views herein expressed and is authority for a broad construction of the statute, but in that case the money had been used by the agent in payment of his own obligations.

The many other questions urged upon the appeal and in the points have been considered, but we are of opinion that there was no error prejudicial to the rights of the defendant, although one of the questions presented requires consideration. * * *

It follows that the judgment should be affirmed.

Section 3.—Obtaining Property by False Pretenses.

STATE v. PHIFER.

1871. SUPREME COURT OF NORTH CAROLINA. 65 N. Car. 321.

Indictment for obtaining goods by false pretences under the statute in the Revised Code, ch. 34, § 67, tried at the Special Term of Wake in January, 1871, before his honor, Judge Watts, when the jury found the following special verdict:

"That the defendant, Robert Phifer, came to the store of the prosecutor, Leopold Rosenthal, representing himself as the son of one P. Phifer, of New York, and offering to sell goods for the house of P. Phifer & Co. to the said Rosenthal. He came to the store of Rosenthal several times and requested Rosenthal to cash several drafts on P. Phifer & Co., which request was refused. He

afterwards offered to buy of Rosenthal a diamond ring, and did obtain the said ring, paying for it by a draft upon P. Phifer & Co., which draft the defendant stated would be paid upon presentation. Rosenthal delivered the ring to him upon the faith of the representation that he was the son of P. Phifer, and that the draft would be paid on sight. The draft was returned protested and unpaid. The defendant was not the son of P. Phifer, and knew that the draft would not be paid." Upon this verdict the court was of opinion that the defendant was not guilty and gave a judgment accordingly, from which Solicitor Cox appealed.

READE, J.⁷³—At common law, to cheat by false symbol or token was a crime. What was such symbol or token was sometimes difficult to determine, and the decisions left it in some confusion. It was settled that it must be some act or thing as contra-distinguished from mere words.

A further question was made in regard to which there were contradictory decisions, as to whether the symbol or token must not be of a public character calculated to impose upon the public generally—as false weights and measures—as contra-distinguished from such as were used to impose upon a private or particular individual. To remedy this last difficulty the statute of Hen. VIII was passed which, reciting the mischief, that the practice had grown up of "getting into possession goods and chattels, etc., by privy tokens and counterfeit letters in other men's names," makes such privy tokens indictable. This statute, added to the common law, makes all cheats by false tokens, whether of a public or private nature, indictable. But still there must be a token, as distinguished from mere words.

But crime is fruitful in expedients. As trade increased and commerce spread out over the world, and stranger had to deal with stranger, and it became impossible for vigilance and prudence to apply the tests of truth—such as weights and measures, actual examinations, or diligent inquiry in business transactions—words had to be trusted. And false words were as ready to be used as false tokens. And thus it became necessary to pass the statute of 30 George II, which makes cheating by "false pretense" indictable.

Our statute is intended to embrace all that was indictable at common law, under Hen. VIII, and 30 George II. The words of our statute are "any forged or counterfeited paper in writing or print, or by any false token, or other false pretense whatsoever."

We have already seen what are false tokens; it is now to be considered what are false pretenses under 30 George II and under our statute. * * *

It is settled that a promise is not a pretense. No matter what the form, or however false the promise to do something in the future, it will not come within the statute. There must be a false

⁷³ Part of the opinion is omitted.

allegation of some subsisting fact; but there need not be any token. Lord Kenyon, Ch. J., said: "That the statute 30 George II was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not * * * Hen. VIII required a token to be used; but that being found to be insufficient the statute of George II introduced another offense, describing it in terms extremely general." And Buller, J., said: "It clearly extended to cases which were not indictable at common law, or under Hen. VIII." It is said in Bishop "no representation of a future event, whether in the form of a promise or not, can be a pretense under the statute, for the pretense must relate to the past, or to the present." And, according to that definition the facts in Simpson's case, *supra*, were not indictable. He professed to want to see the judgment and to pay it off, all in the future.

The following cases put in East and Bishop show how near the lines are together:

"A said to B, I will tell you where your strayed cattle are if you will pay me." Held not to be indictable. But if he had said "I know where they are, and I will tell you," etc., that would have been indictable. So a man promised to marry a woman and obtained money to buy clothes, etc. Held not to be sufficient. But upon its appearing that he represented himself to be unmarried, he was held to be guilty. So if a man buy goods and promises to call to-morrow and pay for them, when he does not mean to do it, this is no false pretense. But if he represent himself to be of large property and able to pay, when he is not, that is a false pretense.

We have discussed these questions at some length because it was necessary to correct the error which generally obtained from Simpson's case, *supra*, which, as was said at the bar, has made it almost impossible to convict for cheating by false pretense in this state.

We state the rule to be that a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation, is a false pretense, indictable under our statute.⁷⁴ But this must not be understood to extend to the mere "tricks of trade," as they are familiarly called, by which a man puffs his wares and deceives no one—as, this is an excellent piece of cloth; or, this is the best horse in the world. Against such craft ordinary prudence is a sufficient safeguard; or if it be not, the injured party must be

⁷⁴ "A false pretense is a false and fraudulent representation or statement of a fact as existing or having taken place, made with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to induce the person to whom it is made to part with something of value." Am. & Eng. Encyc. of Law (2d ed.), vol. 12, p. 804.

left to his civil remedy. Applying the rule to this case, the defendant is clearly guilty. It may be that if the defendant had bought the goods and paid for them with a draft on the New York firm, saying it would be paid on presentation, which he knew was false, it being all in the future, it would not come within the meaning of false pretense; but the defendant represented himself to be the trusted agent of a New York firm, and the son of one of the firm; and this was a representation of a subsisting fact calculated to give him a false credit, and to deceive a prudent man. This was clearly a false pretense, indictable.

There is error. This will be certified that there may be judgment as upon a verdict of guilty.

Per Curiam. Judgment reversed.

KELLOGG v. STATE.

1874. SUPREME COURT OF OHIO. 26 Ohio St. 15.

Error to the Court of Common Pleas of Hamilton county.

At the June term, 1875, of the court below, the plaintiff in error was convicted of the crime of larceny and sentenced to imprisonment in the penitentiary for a term of years.

The testimony offered on the trial showed that in the month of April preceding, the prisoner had obtained \$280 in bank bills from the prosecuting witness under the following circumstances:

The witness and the prisoner had first met and formed a casual acquaintance as passengers on a train of cars passing from St. Louis to Cincinnati. After their arrival at Cincinnati they again met at the railroad depot, where the prosecuting witness was about to take another train for his home in Madison county, when the following occurrences took place, as detailed by the witness: "The defendant asked me if I was going to take that train. I said yes. He said he thought he would go on that train, too. Then a man came up to us and said to the defendant: 'If you want to go on that train you had better get your baggage and pay your freight bill.' The defendant then said: 'Confound those fellows! They won't pay me any premium on my gold, and I have no other money to pay this freight bill, and I don't want to give them two hundred and eighty dollars in gold and get no premium.' He then said to me: 'Will you let me have \$280 in currency, and I will give you this gold to hold as security until I can go to the bank and draw some money which I have there, and I will then pay you \$280 back.' He further said: 'I must get my freight out to-night, and they won't let me have it until I pay the bill, which is \$280.' I then told him I would let him have the two hundred and eighty dollars to

pay his freight bill, which I did, and he gave me fourteen pieces of what he said was gold, and which I took for twenty-dollar gold pieces, and I gave him \$280 in paper money. He started off, and I examined them and found that they were not twenty-dollar gold pieces, nor were they gold at all. * * * I followed him, but did not overtake him or see him any more until he was arrested."

On cross-examination, the prosecuting witness testified as follows: "I delivered my money to him voluntarily. He used no force or violence to obtain it from me. I never expected to get the same money again. He said he would go to the bank and draw some money, and come back and pay me what he borrowed and get the gold." * * *

McILVAINE, C. J.⁷⁵—* * * The testimony before the jury in the court below tended to prove a loan of money from the prosecuting witness to the defendant, whereby the borrower became indebted to the lender, and assumed to make payment in other money. The testimony of the witness was that he voluntarily delivered the money to the defendant and never expected to get the same money again. It is true he was induced to make the loan through the fraud and false pretenses of the defendant. No doubt a crime was thus committed by the defendant, but it was the crime of obtaining money under false pretenses and not a larceny. To constitute larceny in a case where the owner voluntarily parts with the possession of his property, two other conditions are essential: 1. The owner, at the time of parting with the possession, must expect and intend that the thing delivered will be returned to him or disposed of under his direction for his benefit; 2. The person taking the possession must, at the time, intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not constitute a larceny. In such case the title vests in the fraudulent taker, and he can not be convicted of the crime of larceny, for the simple reason that, at the time of the transaction, he did not take and carry away the goods of another person, but the goods of himself.

Had the law been thus stated to the jury, there is no doubt the verdict would have been not guilty as he stood charged in the indictment.

Judgment reversed, and cause remanded for such further proceeding as may be lawfully had in the premises.

Welch, White, Rex, and Gilmore, JJ., concurred.⁷⁶

⁷⁵ Part of the statement of facts, argument of counsel, and part of the opinion are omitted.

⁷⁶ Accord: Holding that where the owner intends to part with title in the property, the crime can not be larceny. *People v. Procter*, 1 Cal.

REGINA v. JONES.

1898. CROWN CASE RESERVED. 1 Q. B. 119.

LORD RUSSELL OF KILLOWEN, C. J.⁷⁷—* * * The facts were shortly these: The prosecutor kept an eating-house, and on June 20 the defendant went in and asked for some soup; he was told that there was none ready, and thereupon asked for some cold beef; he was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal; while there he rang the bell and ordered another half-pint of sherry. Subsequently he again rang the bell, and asked what there was to pay; and upon being told four shillings, said that he had no means of paying, that he had no money, and had (as was the fact) only a halfpenny upon him. Such was the state of the facts. All that the defendant did was to go into an eating-house, order food and refreshment, and eat, but not pay for it; no question was put to him, and no inquiry was made from him by the prosecutor as to his means, nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretences. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example, the case of *Rex v. Barnard*, 7 C. & P. 784, where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the university. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque, and must have known that he had not sufficient means. In the present case the defendant did nothing beyond what I have already stated; no inquiry was made of him, and no statement was made by him. Under the circumstances, we do not think that the case could properly be left to the jury on the first count; there was no evidence that the defendant had obtained these articles by false pretences. * * *

Conviction quashed on first count, and affirmed on second count.

App. 521, 82 Pac. 551; *State v. Copeman*, 186 Mo. 108, 84 S. W. 942; *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589; *People v. Miller*, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. 546; *Welsh v. People*, 17 Ill. 339; *State v. Anderson*, 47 Iowa 142; *Haley v. State*, 49 Ark. 147, 4 S. W. 746; *Miller v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194.

⁷⁷ Statement of facts, and part of the opinion are omitted.

REGINA v. ARDLEY.

1871. CROWN CASE RESERVED. 1 L. R. C. C. 301.

Case stated by the chairman of Quarter Sessions for the County Palatine of Durham.

Indictment for obtaining £5 and an Albert chain of the value of 7s. 6d. by false pretences.

The prisoner was tried on the 2d of January, 1871.

The material facts were as follows:

The prisoner went into the shop of the prosecutor, who was a watchmaker and jeweler, and stated that he was a draper and was £5 short of the money required to make up a bill, and asked the prosecutor to buy an Albert chain which he (the prisoner) was then wearing. The prisoner said: "It is 15-carat fine gold, and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The prosecutor bought the chain, relying, as he said, on the prisoner's statement, but also examining the chain, and paid £5 for it, and gave also to the prisoner in part payment a gold Albert chain valued at 7s. 6d. The prisoner's chain was marked "15 ct." on every link, and in a very short time afterwards he (the prisoner) was apprehended, and then wore another Albert chain of a character similar to that sold to the prosecutor, this also being marked "15 ct." on every link. It was proved that "15 ct." was a hall-mark used in certain towns in England, and placed on articles made of gold of that quality, and that chains when assayed are generally found to be one grain less than the mark, exceptionally two grains. The chain bought by the prosecutor was assayed and found to be of a quality a trifle better than 6-carat gold, and of the value in gold of £2 2s. 9d. It was proved that had it been 15-carat gold it would have been worth £5 10s. Adding the charge for what is called "fashion" or "make," and the price of a locket attached, the chain bought by the prosecutor would be sold for £3 0s. 3d., but had it been 15-carat it would have been sold for £9. There were no drapery goods or anything connected with such trade found on the prisoner, but when arrested he had in his possession a license to sell plate, two watches, two white metal watch-guards, and the chain obtained from the prosecutor.

The chairman was asked by the counsel for the prisoner to stop the case, on the authority of *Reg. v. Bryan*, Dears. & B. C. C. 265, but declined to do so, and left the case to the jury, who found the prisoner guilty, and said they found that the prisoner knew he was falsely representing the quality of the chain as 15-carat gold.

The question was whether or not the prisoner was rightly convicted of obtaining money under false pretences.

The case was argued before Bovill, C. J., Willes and Byles, JJ., Channell and Pigott, BB.⁷⁸

BOVILL, C. J.—The question which we have to consider in this case is whether there was evidence to go to the jury on which they could find the prisoner guilty of obtaining money under false pretences. I think there clearly was evidence; and that it would have been quite impossible for the learned chairman with any propriety to stop the case. There were, in addition to the representations as to the quality of the gold, distinct statements of matters of fact, and there was evidence of the falsehood of these statements. The prisoner stated that he was a draper, and was £5 short of the money required to make up a bill. But there were no drapery goods, nor anything connected with such trade, found on the prisoner, but when arrested he had in his possession a license to sell plate, two watches, two white metal watch-guards, and the chain obtained from the prosecutor; and he wore another Albert chain of a character similar to that sold to the prosecutor, this also being marked 15-carat gold on every link. Looking, therefore, at the whole of the evidence, there is sufficient ground on which the finding of the jury may be supported and the conviction sustained.

But the jury have further found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false. And the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. It is difficult for us, sitting here as a court, to determine conclusively what is fact and what is opinion, what is a specific statement and what exaggerated praise. These are questions for the jury to decide. And the prisoner had this additional security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud.

The case which has been most pressed upon us is *Reg. v. Bryan*. The representation in that case was that certain plated spoons were "equal to Elkington's A." *Prima facie*, that representation would seem to be a mere matter of opinion, and the court held that it was not sufficient to support the conviction. But many of the judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C. J., says: "If the person had represented these articles as being of Elkington's manufacture, when

⁷⁸ Arguments of counsel, and concurring opinions of Willes, J., Byles, J., Channell, B., and Pigott, B., are omitted.

in point of fact they were not, and he knew it, that would be an entirely different thing." Pollock, C. B., says: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply." It is plain that these learned judges considered that a specific representation of quality, if known to be false, would be within the statute. Coleridge, J., expressly concurs in the observations of Pollock, C. B. Erle, J., at the close of his judgment, says: "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A., but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely, plated spoons." Crompton, J., also considered that the statute applies "when the thing sold is of an entirely different description from what it is represented to be." Willes, J., who dissented from the judgment of the court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to the quality of the chain, the conviction is good. The case differs from *Reg. v. Bryan*, because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain.

Conviction affirmed.

WILLIAMS v. STATE.

1908. SUPREME COURT OF OHIO. 77 Ohio St. 468, 83 N. E. 802, 14 L. R. A. (N. S.) 1197.

Error to Circuit Court of Montgomery county.

The plaintiff in error was indicted for obtaining money and property by certain false pretenses, to wit: That certain real estate

situate in Benton township, Pike county, being 110 acres in quantity, was then and there of the value of \$11,000, and that one Martha M. Williams, then and there believing said representation of value to be true, and relying and acting upon that belief, was induced to and did purchase from the plaintiff in error the said real estate, and accepted his deed therefor, and gave to him and one Neal Overholser in payment therefor money and property to the amount and value of \$7,700, whereas, in fact, the said real estate was not then and there of the value of \$11,000, and was of the value not to exceed \$3 per acre—that is, \$330 in all—and that the plaintiff in error then and there knew that the value of said real estate did not exceed the sum of \$330, and knew at the time he so falsely represented the value of said real estate that the same was false. To this indictment the plaintiff in error filed a motion to quash and also a demurrer, which were both overruled; and the case coming on for trial, at the close of the evidence introduced by the State, a motion was made by the defendant to instruct the jury to return a verdict of acquittal, which was overruled. * * * The jury found the defendant guilty and judgment was rendered accordingly, which judgment was affirmed by the circuit court, and this proceeding in error is to reverse that judgment.

DAVIS, J.⁷⁹—A statement of value may be given either as an opinion or as a statement of fact. All the authorities agree that, if a statement of value is given as an opinion merely, it can not be regarded as a foundation for an indictment. But, if the statement is made as an existing fact, when the accused knows it to be false and intends it to be an inducement to the other party, and it is so understood and relied upon by the other party, then it becomes a false representation of a material fact for which the party making the representation is indictable. Whether the representation of value is intended as an expression of opinion, or whether it was made as a statement of an existing fact which the speaker intends to be an inducement to the other party, is therefore a material question of fact, to be determined by the jury.

There is no novelty in this view of the law. In *Reg. v. Evans*, 8 Cox C. C. 257, it was said by Pollock, C. B.: "As my Brother Crowder, J., has suggested, if the prisoner had represented the note to be of the value of £5 when she knew it was not of that value, she might have been guilty of false pretenses." In *People v. Peckens*, 153 N. Y. 576, 591, the court say: "It is insisted that many of the representations to the complainant and her husband, which induced the making and delivery of her deed, were expressions of opinion, and, although false and known to be so, no liability resulted. As a general rule, the mere expression of an opin-

⁷⁹ Part of the statement of facts, and the arguments of counsel are omitted.

ion, which is understood to be only an opinion, does not render a person expressing it liable for fraud. But, where the statements are as to value or quality, and are made by a person knowing them to be untrue, with an intent to deceive and mislead the one to whom they are made, and he is thus induced to forbear making inquiries which he otherwise would, that may amount to an affirmation of fact rendering him liable therefor. In such a case, whether a representation is an expression of an opinion or an affirmation of a fact is a question for the jury. The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing. If it is given in bad faith, with knowledge of its untruthfulness, to defraud others, the person making it is liable, especially when it is as to a fact affecting quality or value and is peculiarly within the knowledge of the person making it. *Watson v. People*, 87 N. Y. 561, 41 Am. Rep. 397; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Hickey v. Morrell*, 102 N. Y. 454, 463, 7 N. E. 321, 55 Am. Rep. 824; *Schumaker v. Mather*, 133 N. Y. 590, 595, 30 N. E. 755." The same view of the question is presented in *Holton v. State*, 109 Ga. 127, 130, 34 S. E. 358, and also in *People v. Jordan*, 66 Cal. 10, 13, 14, 4 Pac. 773, 56 Am. Rep. 73.

Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523, was a civil action for damages for an alleged fraud in inducing the plaintiffs to convey certain premises. The court, at page 306 of 53 N. Y. (13 Am. Rep. 523), said: "The defendant contends that the representations alleged to have been made by the defendant were not such as to afford a ground for an action. It is first insisted that the statements as to the value of the lands and of the mortgages thereon were mere matter of opinion and belief, and that no action could be maintained upon them if false. If they were such, no liability is created by the utterance of them; but all statements as to the value of property sold are not such. They may be, under certain circumstances, affirmations of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them and is misled to his injury, they avoid the contract. *Stebbins v. Eddy*, 4 Mason (U. S.) 414-423, Fed. Cas. No. 13,342. And where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud should be liable for the damage sustained. *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, per Hubbard, J. And see *McClellan v. Scott*, 24 Wis. 81."⁸⁰ More recently the

⁸⁰ But see *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467, where it was held that a false statement of the value of property made by the vendor for the purpose of obtaining a higher price will not sustain an

cases of *Coulter v. Minion*, 139 Mich. 200, 102 N. W. 422, and *Scott v. Burnight*, 131 Iowa 507, are to the same effect.

These considerations determine every question raised upon the record, and therefore the judgment of the circuit court is affirmed. Price, Crew, Summers, and Spears, JJ., concur.

REGINA v. LAWRENCE.

1877. QUEEN'S BENCH DIVISION. 36 L. T. (N. S.) 404.

This was a writ of error upon an indictment for false pretences against Wm. Lawrence, who was convicted of an attempt to obtain the prosecutor's money under the second count, and sentenced to three months' imprisonment at the Middlesex Sessions, before Mr. Edlin, Q. C., the assistant-judge, and other justices.⁸¹ * * *

Ignatius Williams argued for the defendant. The objection to this indictment is that the pretence alleged is a mere matter of opinion, about which it is impossible to obtain proof. There must be a false pretence of a present or past fact; a promissory pretence to do some act is not within the statute. The pretended power to produce the spirits of deceased and other persons not present in a materialized or other form is a matter of general controversy, and has not yet been shown to be impossible by demonstration. Evidence was submitted that many persons doubted about the cause of the results admittedly produced by the defendant.

COCKBURN, C. J.—It is not necessary to hear any argument in support of the indictment, for it seems to me to be a perfectly clear case. The pretence alleged is that the defendant then had power to communicate with the spirits of the deceased and other persons, although such persons were not present in the place where the defendant then was, and also that the defendant had power to produce and cause to be present such spirits as aforesaid in a materialized or other form, and also that divers musical instruments, by the sole means of such spirits so caused to be present, produced musical and other sounds. The jury have found that the pretence of having this power was false, and with the evidence, facts, or other findings we have nothing whatever to do. The only question for us is

action of fraud. In *State v. Paul*, 69 Maine 215, a representation that land was worth \$1,000 was held to be an expression of opinion and not a false pretence. It is well settled that the representation must be as to a past or existing fact, and not be a mere expression of opinion, or a promise of future action, to constitute a false pretence, but the courts differ greatly in the application of the distinctions; see cases in 19 Cyc. 398 and 399.

⁸¹ Part of the statement of facts is omitted.

whether the indictment can be sustained, and we have no doubt that the pretence as alleged is one within the statute. It would be very mischievous if it were supposed that money could be obtained upon such pretences as these, and that there could be a doubt about the remedy.

MELLOR, J.—I am of the same opinion. Mr. Williams' point is that the offense charged is not within the enactment in 24 & 25 Vict., ch. 96, § 88, the false pretence being required to be of an existing fact. The defendant states as a fact that he has power to do these various things, and the jury have found the statement to be false. We are only now on the form of the indictment, and I think it discloses a pretence of an existing fact.

Judgment for the prosecution.⁸²

BOWLER v. STATE.

1867. HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI.
41 Miss. 570.

Error to the Circuit Court of Lowndes County. Hon. W. H. Foote, judge.

Pleasant Bowler was indicted at the February term, 1867, of the Circuit Court of Lowndes County for obtaining money under false pretences.

The indictment charges that on the 30th day of October, 1866, Pleasant Bowler, contriving and intending fraudulently and deceitfully to cheat and defraud one James Lull, clerk of the Columbus Colored Baptist Church, of his goods, chattels and money, falsely and fraudulently did, knowingly and designedly pretend to the said James Lull that he was a regularly ordained minister of the Baptist Church, in good and regular standing; whereas he, the said Bowler, was not a regularly ordained minister, in good and regular standing; and that the said Bowler, by means and color of said false pretences, did falsely and fraudulently obtain from said Lull the sum of \$125, the property of said Lull. * * *

The jury returned a verdict of guilty. A motion for a new trial was made and overruled. The defendant was sentenced to three months' imprisonment in the county jail and to pay a fine of \$100. A writ of error was sued out, returnable to this court.

Ellett, J., delivered the opinion of the court.⁸³

* * * We have carefully considered the evidence, and do not think it was sufficient to sustain the verdict. The false pretence

⁸² Accord: *Reg. v. Giles*, 11 L. T. (N. S.) 643.

⁸³ Part of the statement of facts, and of the opinion, and the argument of counsel are omitted.

must be made with the design to obtain the money. That is clear, and the jury were so charged. The evidence for the State satisfies us that the pretences relied on, whether they were true or false, were not made with any design to obtain the money, or even to procure an employment as pastor of the church. The accused did not seek the place. The congregation, or their representatives, the deacons, as the proof shows, sought him, and invited him to become their pastor. He stated his terms, and left them to reflect upon the subject, and to write to him their conclusion. No doubt he had represented himself to be a minister, and, if they had not believed him to be one, they would not have called him. Whether he was so or not, we do not undertake to decide. But so far as the proof shows, he did not take any step, or use any means, to induce the prosecutors to employ him as their preacher.

Moreover, the evidence also shows that the money was not paid to him in consequence of his representation that he was a minister, but as compensation for services actually rendered by him in his ministerial capacity.

The representations, or pretences, are therefore not so closely connected with the act of obtaining the money as if they were admitted to have been false, to justify a conviction on this indictment.

The judgment will be reversed, the indictment quashed, and the cause remanded for further proceedings, by a new indictment, or otherwise, in the court below.⁸⁴

LEFLER v. STATE.

1899. SUPREME COURT OF INDIANA. 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. 300.

From the opinion of MONKS, J.:

The great weight of the authorities and the better reason sustain the rule that it is not necessary that the pretense be such as will impose upon a man of ordinary caution, or as can not be guarded against by ordinary care and prudence.

The object and purpose of the law is to protect not only the man of ordinary care and prudence, but also the weak and credulous against the strong, the ignorant, inexperienced, and unsuspecting

⁸⁴ Accord: Holding that the false pretense must have been relied on, and have induced the owner to part with his property; *State v. Dines*, 206 Mo. 649, 105 S. W. 722; *Hunter v. State*, 46 Tex. Cr. 498, 81 S. W. 730; *State v. Miller*, 47 Ore. 562, 85 Pac. 81, 6 L. R. A. (N. S.) 365; *Commonwealth v. Drew*, 19 Pick. (Mass.) 179; *Therasson v. People*, 82 N. Y. 238; *State v. Connor*, 110 Ind. 469, 11 N. E. 454; *State v. Tomlin*, 29 N. J. L. 13; *Jackson v. People*, 18 Ill. App. 508.

against the experienced and unscrupulous. *McKee v. State*, 111 Ind. 378, 381, 16 Am. L. Reg. (N. S.) 321-325. In *McKee v. State*, *supra*, it was urged by the appellant that the representations were so unreasonable, and of such a character, as that no person exercising reasonable caution would be warranted in believing them; in response to which this court said: "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves."⁸⁵ * * *

As was said by Dr. Wharton: "The simple and credulous are as much under the shelter of law as are the astute. * * * That gross credulity is no defense is illustrated by the prosecutions sustained against conjurers and fortune tellers." 2 Wharton's Crim. Law (10th ed.), §§ 1188, 1192.

STATE v. HICKS.

1907. SUPREME COURT OF SOUTH CAROLINA. 77 S. C. 289,
57 S. E. 842.

JONES, J.⁸⁶—The defendant was convicted, with recommendation to mercy, on an indictment under § 168, Cr. Code 1902, charging the offense of obtaining money under false pretenses, with intent to cheat and defraud the prosecutor, Thomas Sloan.

The testimony of the prosecutor tended to show that at Greenville, S. C., on Saturday, July 7, 1906, after banking hours, the defendant, representing that he had \$1,000 in the People's Bank of Greenville, requested the prosecutor to cash his check on said bank for \$25, which the prosecutor did, relying upon the truth of said representation; that on next day (Sunday) defendant told the prosecutor that he had no money in the bank; that defendant promised to make it good, and the prosecutor thought he would give him a chance; that after the warrant was issued he received back the \$25, declining to accept interest.

The defendant testified that he did receive the money from the prosecutor on the check; that he did not represent that he had \$1,000 on deposit in the bank, but that he told the prosecutor that if he would give him a check for \$1,000 it would be good; he would not give him a check if he did not have the means to meet it; that he told the prosecutor he would deposit the money in the bank, and

⁸⁵ See cases in accord at page 83 of this opinion; *contra*, early decisions, *Burrow v. State*, 12 Ark. 65; *Commonwealth v. Haughey*, 3 Metc. (Ky.) 223.

⁸⁶ Argument of counsel, and part of the opinion are omitted.

intended so to do; that afterwards, learning that he was ordered by his employer to do a certain work, requiring him to leave Greenville early Monday morning, he went on Sunday to see the prosecutor and told him that he would have to leave town early Monday morning and would be unable to put the money in the bank, but that if he would hold the check he would come by and take it up and deposit the money in the bank; that he then offered to pay back the money to prosecutor if he insisted on it; and the prosecutor said he supposed it was all right; that while working on the job which caused him to leave town on Monday morning he was in a few days taken with something like sunstroke; that he was sick in bed when arrested in this case; that he had no intent to cheat and defraud the prosecutor.

The controlling question raised by the exceptions is whether the court, in response to the request of defendant's counsel to charge that the intent to cheat and defraud must be found to exist in the mind of defendant along with a false pretense, erred in instructing the jury as follows: "If he knew he was making a false pretense, you gather his intent from that false statement. If he knew he had no money on deposit, and by reason of that fact he caused Mr. Sloan to part with his money, that was the intent. If he made a statement which he knew was false, that was the intent."

It is contended that this charge was erroneous in not leaving it to the jury to determine from all the circumstances in the case whether the defendant intended to cheat and defraud.

We regard the exceptions well taken. Section 168, Cr. Code 1902, provides: "Any person who shall, by any false pretense or representation, obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud any person of the same, shall be guilty of a misdemeanor." * * * It is perfectly manifest from the express terms of the statute that an intent to cheat and defraud is an essential element of the statutory crime, and it is elementary that every essential element of the crime must be alleged and proven. This principle was well understood by the prosecuting officer, for the indictment not only alleges that the pretenses were known to be false, but that the defendant thereby intended to cheat and defraud. In Clarke's Criminal Law 281 it is declared: "Intent to defraud by the representation is an essential element of the crime. The making of a false representation is not of itself criminal; it becomes so only when knowingly made, and, further than that, when made with an intention of defrauding thereby. In the absence of such an intent, the crime can not be committed"—and authorities are cited to sustain this statement.

In 12 Ency. Law 824 it is stated: "In order to constitute the

offense there must be an intent to defraud at the time when the property or the signature to an instrument is obtained. To constitute an obtaining by false pretenses it is essential, equally as in larceny, that there shall be an intention to deprive the owner wholly of the property obtained. The intent is the gist of the offense, and ordinarily proof of the existence must depend upon the circumstances attending the transaction." Numerous cases are cited in the notes to sustain the text.

We quote from *Commonwealth v. Jeffries*, 89 Mass. 548, 83 Am. Dec. 721, this pertinent language: "The making of a false pretense or representation is not of itself criminal. It becomes so only by being accompanied with a fraudulent intent. In the words of the statute (Gen. St. 1860, ch. 161, § 54), it must be made designedly and with intent to defraud. This intent is part of the substance of the issue and must be proved. How? According to the nature of the transaction in or about which the false pretense or representation has been made. If it was a case where such pretense has been used in making a contract for the purchase of goods, and the possession has thereby been obtained from the rightful owner, it is essential to show that the party obtaining them did not intend or was not able to pay for them, that is, that he intended to get the goods into his possession by a false pretense for the purpose of defrauding the owner of the price."

It seems useless to cite authorities on the point in view of the express language of the statute. Intention is a question of fact to be submitted to the jury under all the circumstances. When, therefore, the circuit court undertook to draw the inference that the fraudulent intent necessarily exists when the person making the pretenses knows them to be false, he invaded the province of the jury. There are doubtless cases, the nature of which is such that the only natural inference to be drawn from obtaining goods under false pretense, known to be false, is that the intent was to defraud, and in all cases knowledge of the falsity of the representation is a circumstance from which the fraudulent intent may be inferred. Such is doubtless a necessary inference in the absence of other circumstances sufficient to raise a reasonable doubt to the contrary. * * *

The judgment of the circuit court is reversed, and the case remanded for a new trial.

Section 4.—Receiving Stolen Goods.

"Receiving of stolen goods, knowing them to be stolen, is also a high misdemeanour and affront to public justice. We have seen in a former chapter that this offense, which is only a misdemeanour

at common law, by the statute 3 & 4 W. & M., ch. 9, and 5 Anne, ch. 31, makes the offender accessory to the theft and felony. But because the accessory can not in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute 1 Anne, ch. 9, and 5 Anne, ch. 31, that such receivers may still be prosecuted for a misdemeanour, and punished by fine and imprisonment, though the principal felon be not before taken, so as to be prosecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offence is by statute 29 Geo. II, ch. 30, punishable by transportation for fourteen years. So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanour immediately, before the thief is taken, or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes that he shall only make use of one, and not both of these methods of punishment." 4 Black. Com. 132.

REGINA v. WOODWARD.

1862. COURT OF CRIMINAL APPEALS. 9 Cox Cr. C. 95.

Case reserved for the opinion of the Court of Criminal Appeal. At the Quarter Sessions of the Peace for the county of Wilts, held at Marlborough, on the 16th day of October, 1861, before me, Sir John Wither Awdry, Bart., and others my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods, knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labour, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6d. on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY.

G. BRODERICK, for the prisoner.—This conviction, it is contended, can not be sustained. At the trial it was not said on the part of the prosecution that the wife of the prisoner was her husband's agent in receiving the property, but that he subsequently adopted her act of receiving by paying the balance of the price agreed upon. But there was no evidence of any guilty receipt by the wife, or of any subsequent act of receiving by the prisoner. The guilty knowledge and act of receiving must be simultaneous. In *Reg. v. Dring and Wife* (1 Dears. & Bell, 329, 7 Cox Crim. Cas. 382), where a husband and wife were jointly indicted for receiving stolen goods, and the jury found both guilty, stating that the wife received them without the control or knowledge of and apart from her husband, and that he afterwards adopted her receipt, it was held that the conviction could not be sustained as against the husband; and in his judgment, Cockburn, C. J., observed that, "If we are to take it that the jury meant to say, 'We find the prisoner guilty if the court should be of opinion that upon the facts we are right,' then we ought to be able to see that the prisoner took some active part in the matter, that the wife first received the goods and then the husband from her, both with a guilty knowledge." [BLACKBURN, J.—The verdict in this case is that he did receive them; there is no question raised as to whether the verdict was justified. ERLE, C. J.—Receiving is a very complex term. There is the case where two persons stole fowls, and took them for sale in a sack to another person, who knew them to have been stolen. The sack was put in a stable, and the door shut, while the three stood aside haggling about what was to be paid for them. There the judges differed as to whether there was a receiving by the third person in whose stable the sack was put.] That was the case of *Reg. v. Wiley* (4 Cox Crim. Cas. 412). The actual receipt of the goods was by the wife, and it is consistent with the evidence that the goods may never have come into the prisoner's possession at all. (The case of *Reg. v. Button*, 11 Q. B., 3 Cox Crim. Cas. 229, was also cited.)

ERLE, C. J.—The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife, but there was nothing in the nature of a complete receipt of the goods until the thief found the husband and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the hus-

band agreed; till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.

BLACKBURN, J.—The principal felon left the stolen property with the wife as the husband's servant, but the court below, as I understand the case, doubted whether the husband could be found guilty of feloniously receiving, as he was absent at the time when the goods were delivered to the wife, and could not then know that they were stolen. It is found that, as soon as the husband heard of it, he adopted and ratified what had been done, and that as soon as he adopted it he had a guilty knowledge; he therefore at that time received the goods knowing them to have been stolen.

KEATING, J.—I am of the same opinion. The case finds that the agreement as to the price was not complete till the thief and the husband agreed. I think therefore that the receipt was not complete till then, and that the conviction was right. If we were to hold that the conviction was not right, the consequences would be very serious.

WILDE, B.—I read the case as showing that the wife received the goods on the part of the prisoner, her husband, and that act of her was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of *Reg. v. Dring and Wife*, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

MELLOR, J., concurred.

Conviction affirmed.

COMMONWEALTH v. KRONICK.

1907. SUPREME JUDICIAL COURT OF MASSACHUSETTS.
196 Mass. 286, 82 N. E. 39.

Indictment, found and returned in the county of Berkshire in January, 1906, under R. L., ch. 208, § 51, charging that the defendant on May 29, 1905, at North Adams did buy, receive and aid in the concealment of one thousand yards of cloth of the value of fifteen cents a yard, the property of and stolen from the Arnold Print Works, well knowing this property to have been stolen as aforesaid.

In the superior court the defendant was tried before Crosby, J. At the close of the evidence the defendant asked the judge to make five rulings which are referred to in the opinion. The form of the

requests has become immaterial, the substance of the instructions of the judge being stated in the opinion.

The jury returned a verdict of guilty, and the defendant alleged exceptions. The judge imposed sentence, but certified that in his opinion there was reasonable doubt whether the judgment should stand, and ordered that execution be stayed until the further order of the court, and admitted the defendant to bail with sureties in the sum of \$700.

The case was submitted on briefs.

SHELDON, J.—The defendant's counsel have not argued that any one of their first three requests for instructions should have been given as it was framed. But it is contended that under the charge of the judge the jury may have convicted the defendant without sufficient proof of a guilty knowledge on his part that the goods in question had been stolen; that they may have found that the defendant's knowledge of the prior larceny came to him only after whatever dealings he had with the goods in question. If this contention is well founded, manifestly the defendant has been aggrieved. There is only one crime described in Rev. Laws, ch. 208, § 51, upon which this indictment was drawn, although that crime may be committed in either one of the specific modes described in that statute. *Stevens v. Commonwealth*, 6 Met. (Mass.) 241. Accordingly, as was held in that case, the defendant could be convicted upon this indictment if it appeared that he, knowing that the goods had been stolen, either bought or received them, or aided in their concealment. But it needs no citation of authorities to show that no offence is committed unless the defendant has that guilty knowledge at the time at which he commits the act either of buying, or receiving, or aiding to conceal the stolen goods, with the qualification, to which the defendant did not object, that if the goods have been actually stolen it is enough if the defendant believed this to be the case, even though he may not have had full and complete knowledge. *Commonwealth v. Finn*, 108 Mass. 466; *Commonwealth v. Leonard*, 140 Mass. 474, 478, 479, 4 N. E. 96, 54 Am. Rep. 485.⁸⁷

But the defendant's contention does not appear to be well founded. The final instruction to the jury, given in the stead of what had been previously said upon that subject, was that the defendant could be convicted "if he either knew or believed this property was stolen property at the time it came into his possession, or at any time while

⁸⁷ See the following cases holding that proof of actual knowledge that the goods were stolen is unnecessary, if the defendant believed them to be, or there were facts by which he should reasonably have believed them to be: *Weinberg v. People*, 208 Ill. 15, 69 N. E. 936; *State v. Feuerbraken*, 96 Iowa 299, 65 N. W. 299; see, also, *State v. Rountree*, 80 S. Car. 387, 61 S. E. 1072, holding that belief that the goods were stolen is sufficient, but that facts putting a reasonably prudent man on inquiry is not.

it was in his possession he ascertained that it was stolen property and he undertook to deprive the owner of his rightful use of it." This plainly meant that the defendant's undertaking to deprive the owner of the use of the property must have been subsequent to his ascertaining that it was stolen property. This was enough; for the offense was complete, although he may have received the property innocently, if he subsequently, with the guilty knowledge that it was stolen property, bought it or aided in its concealment.⁸⁸

The defendant argues, however, that this instruction was erroneous, because it substituted for the specific acts named in the statute a mere undertaking to deprive the owner of his rightful use of the property. But when the instruction is considered in connection with the evidence and the contentions made at the trial this argument is without merit. The evidence was that the defendant received the goods from the thief and kept them in his store for several days, and afterwards either purchased the goods from the thief and resold them to one Rosenthal or acted as a friendly intermediary in a sale made by the thief to Rosenthal. The judge had already fully explained the bearing of this testimony to the jury, and had stated to them the contentions of the parties. He had plainly said to them that it must be proved that the defendant either had bought, or received, or aided in the concealment of the property; and this never was withdrawn or modified. The final instruction now under consideration was expressly given with reference only to the defendant's knowledge of the previous larceny. The jury could not have understood that they were at liberty to convict unless the defendant either had bought, or received, or aided in the concealment of the stolen property, with a guilty knowledge that it was stolen property at the time he committed the specific act for which he was convicted.

Nor was the judge bound to give the defendant's fifth request in the language in which it was framed, or to call the jury's attention to one particular piece of the testimony. The question whether the sale was made to defendant or to Rosenthal was left directly to the jury; and they were properly told that if the former alternative was proved, that is, if the defendant himself bought the goods, it made no difference whether he bought them acting for himself or as agent for Rosenthal. There is nothing in *Commonwealth v. Remby*, 2 Gray (Mass.) 508, inconsistent with this.

Exceptions overruled.

⁸⁸ Of the crime of receiving stolen goods Bishop says: "As foundation for the criminal intent, without which there can be no crime, and by the statutory terms, the receiver must know the goods to have been stolen. And this knowledge must exist at the very instant of the receiving. It need not be such direct knowledge as comes from witnessing the theft; but, in the words of Bramwell, B., "it is sufficient if the circumstances were such, accompanying the transaction, as to make the

STATE v. CONKLIN.

1911. SUPREME COURT OF IOWA. 153 Iowa 216, 133 N. W. 119.

SHERWIN, C. J.⁸⁹—The defendants were originally tried in justice court on an information charging that they had knowingly received and aided in concealing certain stolen property, consisting of onions, cabbage, potatoes, and other articles therein specified; said property having been stolen by one Enos Dean. They were convicted before the justice, and appealed to the district court, where they demurred to the information, on the ground that it charged more than one offense, that it failed to set out the names of the owners of the property, and was bad for duplicity. The demurrer was overruled, and thereupon the defendants entered pleas of not guilty and of former acquittal. At the close of the state's evidence it was required to elect on which of the articles alleged to have been stolen and concealed it would rely for a conviction, and the state then elected to rely upon the charge that the defendants had received and aided in concealing two bunches of shingles. The trial then proceeded, and the defendants were again found guilty.

* * *

Dean occupied a room in the defendant's home, and the defendants asked an instruction to the effect that if the stolen shingles were found in his room, in his possession, then they were not in the possession of the defendants. This instruction was refused, and the ruling is said to be error. It was not error to refuse the request. It was not necessary to show that the stolen property was ever in the possession of the defendants. It was enough to show that they knew that it was stolen, and that they by some means aided in concealing it.⁹⁰ *State v. St. Clair*, 17 Iowa 149. And there was abundant evidence of that fact. The evidence, in fact, showed that the shingles were stolen and put in Dean's room upon

prisoner believe the goods had been stolen." 2 Bishop's New Crim. Law (8th ed.), § 1138.

In *Pat v. State*, 116 Ga. 92, 42 S. E. 389, Fish, J., says: "Complaint was made of a charge of the court to the effect that if the accused did not know that the goods were stolen at the time she received them, but knew after she received them that they were stolen, and then secreted them, the jury would be authorized to convict her. We think this charge was erroneous. The gist of the offense of receiving stolen goods, knowing them to be stolen, is the felonious knowledge that the goods were stolen; and to constitute the offense, the person receiving the goods must have this knowledge at the time of receiving them. *State v. Caviness*, 78 N. Car. 484; *May v. People*, 60 Ill. 119."

⁸⁹ Part of the opinion is omitted.

⁹⁰ "To convict an offender four things must be proved: * * * 2. That the accused bought or received them from another person, or aided in concealing them. * * *" 34 Cyc. 515.

the defendants' request, and when they were discovered by aid of a search warrant both defendants stated that they had bought them. We have read the evidence in this case with care and think it sufficiently supports the verdict and judgment. There is no error demanding a reversal of the judgment, and it is therefore affirmed.

WEAVER, J. (dissenting).—The admission of testimony as to matters formerly sworn to by the absent witness is clearly erroneous, and should work a reversal.

EVANS, J., joins in the dissent.⁹¹

PEOPLE v. O'REILLY.

1913. APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK.
153 App. Div. 854, 138 N. Y. S. 776.

INGRAHAM, P. J.⁹²—The defendant has been convicted of the crime of criminally receiving stolen property, in violation of § 1308 of the Penal Law (Consol. Laws, 1909, ch. 40). On March 2, 1911, Aaron Bancroft, a broker of this city, 84 years of age, was carrying securities valued at over \$60,000 from his office to the Produce Exchange vaults, when he was jostled by two men, who afterwards appeared to have been known as Yates and Ross, which caused him to drop the envelope in which the securities were contained, whereupon

⁹¹ See also *Reg. v. Smith*, 6 Cox Cr. C. 554; *Reg. v. Miller*, 6 Cox Cr. C. 353. In *People v. Ammon*, 92 App. Div. (N. Y.) 205, 87 N. Y. S. 358 (affirmed in 179 N. Y. 540, 71 N. E. 1135), the defendant was convicted of criminally receiving certain moneys stolen by one Miller. The court said: "It is claimed by the defendant that the money having been deposited by Miller or handed over to the banking house for the purpose of being deposited for his account, there was thereby created between the banking house and Miller the relation of debtor and creditor, and that such transfer was not a receipt of the stolen property within the provisions of § 550 of the Penal Code, but it is entirely clear that there was no deposit of the money by Miller by which the title to the money vested in the bankers and Miller became a creditor to the bankers for the amount. The money was delivered to the receiving teller to be counted, and pending the counting of the money its disposition was to be determined by Miller. He would have been entitled to receive back at any time before it was finally deposited by the defendant the identical money which was in the hands of the teller of the banking house. He never parted with his title to the money until, with his consent, it was transferred to the defendant and by him deposited with the bankers. When the defendant made out the deposit slip which placed this money to his credit and that slip was received by the banking house with the money, whether it was in the defendant's actual custody or not, he then received the money which, prior to that time, had been in the possession of Miller, and appropriated it to his own use."

⁹² Part of the opinion is omitted.

they apologized and helped to brush him off, and one of them handed him what he thought was the envelope containing his securities, which he placed in his safe deposit vault, to discover, four days later, when he had occasion to open it, that it was filled with newspapers. The fact that the envelope substituted for the one containing his securities was similar to that used by him in his office led to the inference that some one familiar with the business methods there had been a party to the crime.

The defendant is not charged with any complicity in the original taking of these securities, but his alleged crime arises from his connection with the return thereof to the attorney for Bancroft for a consideration of \$5,000, and with the acts leading up thereto. It appears that William M. Sullivan, who was the attorney for the firm of George Bancroft & Co., had been acting with the police in the endeavor to recover the stolen securities, when on March 24, 1911, he was called up on the telephone by the defendant, who inquired if he represented Bancroft & Co., the owner of certain stolen securities, to which Sullivan replied in the affirmative. The defendant then expressed his desire to see Sullivan, and was told he could do so, whereupon he came to Sullivan's office in a few minutes, and, after stating that he was an attorney, again asked Sullivan if he represented Bancroft & Co., the owner of certain securities that had been stolen, and when answered in the affirmative went on to say that he knew "the fellows that did the Bancroft job, and my men want to know how much you will pay to get the securities back." Sullivan replied that no reward had been contemplated, but that the premiums to be paid on a bond required to be given to secure the reissue of the certificates would amount to \$5,000 or \$6,000. The defendant then said, "My men want \$20,000 before they will give you the securities"; whereupon Sullivan said: "You say you know the men who did this job?" to which defendant replied in the affirmative, as well as to a further question, "And you know the securities were stolen?" When the defendant was then asked why he did not turn "those fellows" over to the police, he said he could not do that, but that, if he was given \$10,000, he would get the securities from the thieves for Sullivan. He then volunteered to see "his men" and see what could be done to induce them to take less than \$10,000, and left, promising to return. He again telephoned on the same day, saying he would see "his men" at 2 o'clock in the afternoon, and later sent a third call to the effect that he had seen "his men," and if Sullivan wanted to do business about getting the securities to come to defendant's office at once. Sullivan then went to defendant's office, where he was seated at his desk in his private room with one Frank J. Plass beside him. The defendant introduced Plass as Mr. Smith, whereupon the latter at once arose and said: "Well, are you ready?" Sullivan inquired

where they were going, to which O'Reilly answered, "To get the securities." At this time Sullivan had in his possession \$10,100 in cash, consisting of ten \$1,000 and two \$50 bills inclosed in an envelope, whose numbers he had retained. He went with O'Reilly and Plass to the Astor House, Plass going ahead and selecting a taxicab there, and two detectives secretly following at a distance. Defendant said to Sullivan, "Get in," to which Sullivan inquired where they were going, and said they had to be careful, whereupon defendant replied, "It is all right, Mr. Sullivan; you are in my care." Sullivan testified that O'Reilly sat in the back of the taxicab alongside him, with Plass in front of O'Reilly; the vacant seat, which was fastened up, being in front of Sullivan. After the taxicab had gone some distance up Broadway, defendant turned to Plass and said:

"I hope you appreciate that I am in a delicate situation. I could be disbarred for this."

At about Twenty-third street Plass inquired: "Are you ready to do business?" to which Sullivan replied:

"Why, that is what I am here for. I am here to get the stolen securities."

Plass replied: "Here they are," and pulled them out of his pocket. He then spread them on his lap, while Sullivan took the list from his pocket, and pulling down the seat that was vacant in front of him, checked them off in lead pencil as they were read off by Plass. As Plass read off the numbers and descriptions of the securities, he handed them to the defendant, who held them. Sullivan testified that he never had physical possession of the securities until he paid the money, and that he looked over O'Reilly's shoulder to verify the certificates before he checked them off. After the list had been checked, it was found that three certificates, for 100 shares each, of the American Smelters Company, were missing, whereupon Plass said:

"They never were here. I had this envelope less than 30 minutes after the robbery was committed, and it has not left my possession, and I know those securities were not in the envelope."

Sullivan was positive that O'Reilly held the certificates as they were turned over by Plass, and retained them. Two certificates were found and turned over to O'Reilly, which were not on Sullivan's list, and O'Reilly said:

"Well, you see how honest my men are. Here are two certificates that you did not even ask for."

An argument ensued as to the absence of the certificates for 300 shares, and Sullivan refused to pay any money unless he had all the stolen securities, to which defendant replied:

"These securities were never stolen. My men never had them, and I have told you, if you are right about that, and you don't

find them down in Bancroft's office, I can get these men any time I want."

Sullivan then paid Plass \$5,000, whereupon O'Reilly turned and said: "Well, where do I come in?" Whereupon Sullivan, taking off the next bill, said: "I suppose you want this?" to which defendant replied: "Sure." Whereupon Sullivan gave him a \$50 bill, and O'Reilly handed him the securities. * * *

That defendant knew this property was stolen was conceded, and that he received the property from Plass when in the taxicab, and held it in his possession until the reward was paid, when he delivered it over to Sullivan, who represented the owner, and at the same time received for his own use the sum of \$50, is conclusively established. Whether he was "nominally" retained by Sullivan to assist him in securing the property or not seems to me immaterial, as it is clear that he represented the thieves and acted as their representative in obtaining from Sullivan, representing the owner of the property, the sum of \$5,000 for the thieves and \$50 for himself as a condition for its return to its lawful owner. There can be no doubt but that Plass was guilty of receiving this stolen property, and extorted the sum of \$5,000 from its owner as a condition of its return, and that the defendant aided and abetted him in the transaction and thereby became a principal. Section 2 of the Penal Law. Whether the defendant is to be treated as a principal, or as aiding and abetting Plass in receiving and retaining this stolen property until the reward was paid, would make no material difference. Both were guilty of the crime, and subject to indictment and conviction as principals.

The court charged the jury, if they found, as claimed by the defendant, that he did not represent the thieves and was not acting on their behalf or for their advantage, but was simply acting as the paid attorney of the owner, or was simply acting in a disinterested way to help the police to run down the thieves or to obtain the restoration of the property, that then he was not guilty of any crime, and if through all these transactions he honestly believed he was acting innocently, and held that belief honestly, he was not guilty of any crime; and at the request of the defendant the court charged the jury that if the defendant was present in the taxicab with the honest purpose of aiding and assisting the lawful owner in procuring the restoration of the stolen property he was not guilty of any offense. This instruction was certainly as favorable as the defendant could have claimed, and there was no exception to the charge, or any request by the defendant to the court to charge which was refused.

The defendant was a lawyer, and told his own story to the jury, and so far as there was a question of fact raised by his denial of the testimony offered for the prosecution the jury decided against

him. An examination of this testimony entirely satisfies us that the verdict of the jury was correct, and that the defendant was guilty, and we are convinced that the jury could have arrived at no other conclusion upon any fair and intelligent consideration of the testimony.

The defendant has asked for a reversal because of certain alleged errors in the receipt and exclusion of testimony in regard to the witnesses produced by the defendant as to his character. We have examined all those rulings, but none of them would justify a reversal of the judgment. Most of the questions which were objected to and allowed were rendered clearly competent by the nature of the direct examination of the character witnesses, or by the testimony of the defendant himself on the stand. We think it entirely clear that the defendant had a fair trial, that all his rights were properly preserved, that the testimony overwhelmingly established his guilt, and that there was no ruling on the trial which would justify a reversal.

Entertaining this conviction, it follows that the judgment appealed from is affirmed. All concur.⁹³

PEOPLE v. JAFFE (page 70, *supra*.)⁹⁴

Section 5.—Forgery.

REGINA v. CLOSS.

1857. COURT OF CRIMINAL APPEALS. 7 Cox Cr. C. 494.

The following case was reserved from the Central Criminal Court by the common serjeant of the city of London.

The prisoner was tried at the last October session of the Central

⁹³ "To constitute the offense of receiving stolen property, knowing the same to have been stolen, the act of receiving or concealing must be accompanied by a criminal intent, an intent to aid the thief or to obtain a reward for restoring the property to the owner, or an intent to in some way derive profit from the act. There must be a guilty knowledge, a fraudulent intent concurrent with the act. (*Nourse v. State*, 2 Tex. App. 304.) If the property was received or concealed with the purpose and intent of restoring it to the owner without reward, or with any other innocent intent, the mere knowledge that it was stolen property would not make the act criminal. (*Desty's Am. Crim. Law*, 147c.)" *Arcia v. State*, 26 Tex. App. 193, 9 S. W. 685. To the above statement it should be added that a fraudulent intent to deprive the owner of his property is a sufficient criminal intent.

⁹⁴ Accord: *Reg. v. Schmidt*, 10 Cox Cr. C. 172.

Criminal Court on an indictment, the first count of which charged him with obtaining money by false pretences, and upon this he was acquitted. He was, however, found guilty upon the remaining counts of the indictment, which were as follows: And the jurors aforesaid upon their oath aforesaid do further present that before the time of the commission of the offence in this count herein-after stated and charged, one John Linnell, of Redhill, in the county of Surrey, an artist in painting of great celebrity, and well known as such to the liege subjects of our Lady the Queen, had painted a certain large and valuable picture, whereon he had painted his name to denote that the said picture had been painted by him, the said John Linnell. And the jurors aforesaid upon their oath aforesaid do further present, that the said Thomas Closs, being a dealer in pictures, well known in the premises aforesaid, and being a person of fraudulent mind and disposition, and devising, contriving, and intending to cheat and defraud on the 24th day of July, in the year of our Lord, 1857, and on divers other days between that day and the time of taking this inquisition, knowingly, wilfully, falsely, fraudulently, and deceitfully, and within the jurisdiction aforesaid, did keep in a certain shop wherein he the said T. Closs did carry on his said trade of a dealer in pictures, a certain painted copy of the said picture, on which said painted copy was then and there unlawfully painted and forged the name of the said John Linnell, with intent thereby and by means thereof to denote that the said copy of the said picture was an original picture painted by the said J. Linnell. And the jurors aforesaid upon their oath aforesaid do further present, that the said T. Closs well knowing the said picture so in his possession to be such copy of the said picture so painted by the said J. Linnell as aforesaid, and well knowing the name of the said J. Linnell so painted upon the said copy to be forged, did wilfully, falsely, fraudulently, and deceitfully, and within the jurisdiction aforesaid, offer and expose for sale the said copy with the said forged name so upon it, and did offer, utter, dispose of, sell and put off to Henry Fitzpatrick the said painted copy as and for the genuine picture of the said J. Linnell, with intent to cheat and defraud the said H. Fitzpatrick of his moneys and valuable securities; and that the said T. Closs did so fraudulently cheat and defraud the said H. Fitzpatrick of, and did so fraudulently obtain from the said H. Fitzpatrick valuable securities, to wit, a cheque and three bills of exchange, with intent to defraud. * * *

McIntyre for the prisoner.—* * * The crime of forgery is defined in Russ. 318 to be "the fraudulent making or altering a writing to the prejudice of another man's right," and it clearly does not include this case. Forgery must be of the whole or of some material part of a written instrument. What was done here was

no more than saying that the picture was painted by Linnell. But there can not be a forgery of a picture. It may be imitated, but it can not be forged. The name of "Linnell" is no more than a tree or a house painted upon it. It is part of the whole thing imitated, but it is not a forgery. Suppose a man were to put the name of Joseph Manton upon a gun, and pass it off as made by that maker, surely that would not be a forgery of the gun, although it might be a false pretence knowingly to obtain money by so representing it. The name of a painter on a picture is no more than a trade mark on goods, and it has never yet been held that copying trade marks is forgery. The only subject of forgery here would be the signature, but there is no averment that there was any uttering of the forged signature as distinct from the picture, even if that would be an offence. Suppose in the case of the gun that it was really made by Manton, but that his name was put on it by some other person, could the instrument be said to be forged, when in truth it was genuine, and nothing about it was spurious except the trade mark?⁹⁵

Metcalf for the prosecution.—It is not necessary to show that the cheat was one which affected the public generally (Alleyn's case, Tremain's P. C. 109; Re Worrell, *ib.* 106), any fraudulent device calculated to deceive a person of ordinary understanding is sufficient. A bare lie may not be indictable, but if to that is added a false token, then there is a cheat at common law. The third count is a good count for forgery. It shows that the signature of Linnell was a forgery, and that the prisoner knowingly put off the picture with the signature upon it. It is distinctly averred, therefore, that the prisoner uttered the signature if he uttered the picture with the signature attached. Suppose he had uttered a separate document, purporting to be a certificate of Linnell, signed by him, that the picture was of his painting, that would surely be a forgery, and the fact that such certificate is on the painting itself will not make it less a forgery. (R. v. Toshack, 1 Dear. C. C. 285, 23 L. J. 51; M. C.; R. v. Sharman, 6 Cox Crim. Cas. 312.)

COCKBURN, C. J.—If you once go beyond a writing where are you to stop? Could there be a forgery of sculpture? There is here no allegation of a distinct uttering of the signature.

METCALFE.—There is a sufficient averment to sustain the indictment after verdict.

WILLIAMS, J.—It is quite consistent with the facts here that the defendant sold the picture without calling attention to the signature.

McIntyre replied. Cur. Adv. Nult.

Judgment.

COCKBURN, C. J., now delivered judgment as follows: The pris-

⁹⁵ Part of the indictment, and of the argument of McIntyre, are omitted.

oner was indicted on charge of having sold to one Fitzpatrick a picture as and for an original picture painted by Linnell, when in truth it was only a copy, and that he had passed it off by means of having the name "J. Linnell" painted in the corner of the picture in imitation of the original, which bore such signature. There were three counts in the indictment. The first was for obtaining money by false pretences, on which the prisoner was acquitted. The second was for a cheat at common law; and the third for a cheat by means of forgery at common law. As to the third count, we are all of opinion that that was no forgery. A forgery must be of some document or writing; but the name of Linnell in this case can only be regarded as an arbitrary mark put upon the picture by the painter to enable him to recognize his own work. As to the second count, we have carefully looked into the authorities, and we think that if a person in the way of his trade or business put, or suffer to be put, a false mark or token upon any article so as to pass off as genuine that which is spurious, and the article is sold, and money obtained by means of that false mark or token, that is a cheat at common law. As for instance in the example put of a man selling a gun with the mark of a particular manufacturer upon it, he intending to have it believed that it was the work of such manufacturer, but well knowing it was not so, that would be a cheat, and the seller would be liable to punishment. But then the indictment must be framed to meet such a case, and we are of opinion that this count is not so framed; for although it sets out the false token, it does not sufficiently show that it was by the means of that false token that the prisoner was enabled to pass off the picture upon the prosecutor, and to obtain his money. We think, therefore, that this conviction can not be sustained.

CROMPTON, J.—With respect to cheats at common law the modern authorities have to some extent qualified the older ones, and left the law upon the subject in some doubt. In this case, however, I think no such difficulty arises, and I therefore agree with the rest of the court that the conviction must be quashed.

Conviction quashed.

STATE v. CORDRAY.

1906. SUPREME COURT OF MISSOURI. 200 Mo. 29, 98 S. W. 1, 9 Ann. Cas. 1110.

GANTT, J.⁹⁶—On June 23, 1905, the grand jury of Buchanan county returned an indictment against the defendant, charging him

⁹⁶ Part of the opinion is omitted.

with forgery in the third degree, to wit, the unlawfully making and forging a certain lease and chattel mortgage and assignment, purporting to be an act of one J. Herety, to the Union Mercantile Company, with intent to defraud, etc.

The defendant was arrested and duly arraigned and entered his plea of not guilty, and was tried and convicted at the September term, 1905, of the criminal court of Buchanan county. * * *

There is perhaps no proposition in criminal law upon which there is more unanimity of opinion among text writers and the courts of last resort than that pertaining to the essentials of what is necessary to constitute an indictable forgery, and that one of these essentials is that the alleged forged instrument shall possess some apparent legal efficacy. Thus, Mr. Bishop in his *Criminal Law* (7th ed.), vol. 2, § 533, says: "To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must, also, be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud."

Blackstone defines forgery to be "the fraudulent making or alteration of a writing to the prejudice of another man's right."

In 13 Am. and Eng. Law (2d ed.), 1082, it is said: "Forgery is the false making, or alteration with fraudulent intent, of any writing, by which the party committing the act may wrongfully obtain something of value to the prejudice of another's rights, because of the apparent legal efficacy of the writing and its capacity to deceive." This court, in *State v. Warren*, 109 Mo. 430, 19 S. W. 191, 32 Am. St. 681, ruled that the intent to defraud is an essential element of the crime, and must be averred and proved. Both at common law and in the highest courts of the several states of the Union, it has uniformly been held that, in order to be the subject of forgery, the instrument upon its face must, if it were genuine, be of some apparent legal efficacy for injury to another, and if on its face it is utterly valueless and of no binding force or effect for any purpose of harm, liability or injury to any one, it can not be the subject of forgery. *Colson v. Com.*, 110 Ky. 233, 61 S. W. 46; *King v. State*, 43 Fla. 100, cit. 218, 219, 31 So. 254; 19 Cyc. 1379, and cases cited in note 94. In *People v. Tomlinson*, 35 Cal. 503, it was said by the court: "The purpose of the statute against forgeries is to protect society against fabrication, falsification, and the uttering, publishing, and passing of forged instruments, which, if genuine, would establish or defeat some claim, impose some duty, or create some liability, or work some prejudice in law to another in his rights of person or property. Hence, without much conflict, if any, it has been held from the outset that the indictment must show that the instrument in question can be made available in law to work the intended fraud or injury. If such appears to

be the case upon the face of the instrument, it will be sufficient to set it out in the indictment; but if not, the extrinsic facts, in view of which it is claimed that the instrument is available for the fraudulent purpose alleged in the indictment, must be averred. If the indictment merely sets out an instrument which is a nullity upon its face without any averment showing how it can be made to act injuriously or fraudulently, by reason of matter *aliunde*, no case is made. This rule is so well settled by the precedents that we do not feel called upon to discuss it upon principle." And to the same effect is *Burden v. State*, 120 Ala. 388, 25 So. 190, 74 Am. St. 37; *Howell v. State*, 37 Tex. 591. Tested by the foregoing statements of the law, would the instrument set forth in full in the indictment in this case have any legal efficacy if it had been genuine? It is described in the indictment, first, as a "lease," but when we look at its terms, no length of time is fixed for the lease to run, and no consideration therefor is expressed. On the contrary, it recites that it is for "----- months," and then, when the alleged consideration is reached, it provides, "On leaving the order for said goods ----- dollars, on the delivery of the same, ----- dollars, and every week thereafter the sum of ----- dollars." Again, it is purported to be for the rent of household goods and jewelry, but what household goods and jewelry is nowhere mentioned, set forth or included in the covenants and agreements contained in the said instrument. As a lease it is utterly without any legal efficacy. It is also charged to have been a "chattel mortgage," but a reading of the document alleged to have been forged will demonstrate that it conveys no personal property, and names no debt upon the failure to pay which the same may be foreclosed by the mortgagee. The instrument is utterly silent as to the amount of any mortgage debt. It is also denominated in the indictment as an "assignment," but the so-called goods and chattels which were assigned are referred to as household furniture, wearing apparel, carpets, pictures, pianos, and chattels now in and about the residence of the undersigned, at number -----, and there are no allegations in aid of the instrument showing or tending to show in what house or in what place or what household furniture or wearing apparel were in said house. The instrument does further purport to sell and assign all the salary and wages of some person that are due and to become due from some unnamed person.

Without further elaborating the defects and insufficiency of this instrument, it is sufficient to say that if it had been genuine, it would have had no legal efficacy whatever, and would have bound no person to have paid any rent in any definite sum or at any definite time whatever, and, as a chattel mortgage, would have amounted to no more than a blank piece of paper. As the indictment sets forth the alleged instrument in its very words without any averment

showing in the most remote manner how it could have been made to act injuriously or fraudulently by reason of matter *aliunde*, it must be held that it charges no offense against the laws of this state, because the instrument alleged to have been forged was and is of no legal validity, and as this appears upon the face of the record proper, it must be held that the indictment is insufficient to support the judgment and sentence of the court and the verdict of the jury, and the judgment is therefore reversed and the prisoner discharged.

Burgess, P. J., and Fox, J., concur.⁹⁷

COMMONWEALTH v. BALDWIN.

1858. SUPREME JUDICIAL COURT OF MASSACHUSETTS. 11 Gray 197, 71 Am. Dec. 703.

THOMAS, J.—This is an indictment for the forgery of a promissory note. The indictment alleges that the defendant at Worcester in this county, “feloniously did falsely make, forge and counterfeit a certain false, forged and counterfeit promissory note, which false, forged and counterfeit promissory note is of the following tenor, that is to say:

“\$457.88. Worcester, Aug. 21, 1856. Four months after date we promise to pay to the order of Russell Phelps four hundred fifty-seven dollars eighty-eight cents, payable at Exchange Bank, Boston, value received. Schouler, Baldwin & Co.’—with intent thereby then and there to injure and defraud said Russell Phelps.”

The circumstances under which the note was given are thus stated in the bill of exceptions: Russell Phelps testified that the note was executed and delivered by the defendant to him at the Bay State House in Worcester, on the 21st of August, 1856, for a note of equal amount, which he held, signed by the defendant in his individual name, and which was overdue; and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co. the defendant said: “Henry W. Baldwin and William Schouler of Columbus.” He further said that no person was represented by the words “& Co.” It appeared in evidence that the note signed Schouler, Baldwin & Co. was never negotiated by Russell Phelps. The government offered evidence which tended to prove either that there never had been any partnership between

⁹⁷ Accord: Holding that the instrument must have some apparent legal efficacy for injury to another. *Reed v. State*, 28 Ind. 396; *State v. Van Auken*, 98 Iowa 674, 68 N. W. 454; *Burden v. State*, 120 Ala. 388, 25 So. 190, 74 Am. St. 37; *Goodman v. People*, 228 Ill. 154, 81 N. E. 830.

Schouler and Baldwin, the defendant; or, if there ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

It would be difficult perhaps by a single definition of the crime of forgery to include all possible cases. Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may even be in the name of the prisoner, if it purports to be, and is desired to be received as the instrument of a third person having the same name.

As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

An exception is stated to this last rule by Coke, in the Third Institute, 169, where A made a feoffment to B of certain land, and afterwards made a feoffment to C of the same land with an antedate before the feoffment to B. This was certainly making a false instrument in one's own name; making one's own act appear to have been done at a time when it was not in fact done. We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee, and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin—the entry of the feoffor upon the land with the charter and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed—it is not easy to see how the date could be material.

The case of *Mead v. Young*, 4 T. R. 28, is cited as another exception to the rule. A bill of exchange payable to A came into the hands of a person not the payee, but having the same name with A. This person indorsed it. In an action by the indorsee against the acceptor, the question arose whether it was competent for the defendant to show that the person indorsing the same was not the real payee. It was held competent, on the ground that the indorse-

ment was a forgery; and that no title to the note could be derived through a forgery. In this case of *Mead v. Young* the party assumed to use the name and power of the payee. The indorsement purported to be used was intended to be taken as that of another person, the real payee.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms, "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee; he would have obtained the discharge of the former note by a false pretence, a pretence that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." 1 Hawk., ch. 70, § 5.

If the defendant had written upon the note, "William Schouler by his agent Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co. Or if the partnership had in fact before existed but was then dissolved, the effect of the defendant's act was a false representation of its continued existence.

In the case of *Regina v. White*, 1 Denison 208, the prisoner indorsed a bill of exchange, "per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make the indorsement, but the twelve judges held unanimously that the act was no forgery.

The *nisi prius* case of *Regina v. Rogers*, 8 Car. & P. 629, has some resemblance to the case before us. The indictment was for uttering a forged acceptance of a bill of exchange. It was sold and delivered by the defendant as the acceptance of Nicholson & Co. Some evidence was offered that it was accepted by one T. Nicholson in the name of a fictitious firm. The instructions to the jury were perhaps broad enough to include the case at bar, but the jury having found that the acceptance was not written by T. Nicholson, the case went no further. The instructions at *nisi prius* have

no force as precedent, and in principle are plainly beyond the line of the settled cases.

The result is, that the exceptions must be sustained, and a new trial ordered in the common pleas. It will be observed, however, that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause. Exceptions sustained.

STATE v. DORRANCE.

1892. SUPREME COURT OF IOWA. 86 Iowa 428, 53 N. W. 281.

GIVEN, J.—1. The single question presented by this appeal is whether the court erred in sustaining defendant's motion for a verdict upon the ground stated. The instrument claimed to have been forged is a statement of an account as follows: "Le Claire, Iowa, July 2, 1890. Str. Irene and D. F. Dorrance bought of F. P. Schworm, dealer in staple and fancy groceries and hardware. Steamboat supplies a specialty." Following this is an enumeration of 17 different items of merchandise as purchased on different dates in March, April, and June, 1887, with the price of each item, the whole amounting to \$29.62. Immediately following the enumeration of items and the footing is the following receipt: "Received payment in full. (Sgd.) F. P. Schworm. C." The claim of the state is that the account, as originally made out and receipted, was against the steamer Irene D., and that the defendant inserted therein the words "and" and "D. F. Dorrance," as shown above, and that he did so with intent to defraud F. P. Schworm by making said receipted account an acquittance or accountable receipt to himself. The evidence for the state shows that the receipted account was for merchandise sold to the steamer Irene D., of which the defendant was a part owner; that the account was originally made out against the steamer Irene D., and paid by the defendant; that upon receiving the payment, F. P. Schworm receipted the account as shown above, and delivered the same to the defendant. It also appears that upon different dates in March and December, 1889, and June, 1890, F. P. Schworm sold to the defendant, upon his individual credit, items of merchandise differing in kind, quantity, and price from those sold to the steamer Irene D., which account amounted to \$28.40. F. P. Schworm brought suit before a justice of the peace against the defendant upon the last-named account. Upon the day of the trial this defendant handed said receipted account to the justice, and claimed that he did not owe F. P. Schworm anything. The receipt account, when handed to the justice, showed that it was against the steamer Irene and D. F. Dorrance.

Assuming that the defendant did make the alteration claimed, our inquiry is whether under the facts and the law that alteration constitutes forgery. It is not every making or altering of a record or instrument, such as are enumerated in the statute as the subjects of forgery, that constitutes that crime. It is only where the making or alteration brings into existence a false record or instrument. Code, § 3917; *State v. Johnson*, 26 Iowa 407. In that case it is said "that forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." This definition is in harmony with those found in the books. The defendant, as part owner of the steamer *Irene D.*, was certainly privileged to pay the account against the boat, whether personally liable therefor or not. He did pay it, and received the account receipted in full. It will be observed that the receipt is, according to the face of the account, to the "*Steamer Irene and D. F. Dorrance*," and not to either as distinct from the other. It is not a receipt to these, or either of them, in full of all demands, but only in full of that particular demand. For the defendant to have inserted his name in the account, as is claimed, did not change the legal efficacy of the instrument. Taken as a whole, it showed payment of that particular account alone, and its legal efficacy is in nowise changed by the presence or absence of the defendant's name. The alteration claimed to have been made by the defendant was not an alteration in a material respect. It did not change the legal effect of the instrument, and was not therefore such a false altering thereof as to constitute forgery. As we have said, the receipt was simply in full of that account; it was not evidence of payment of the account upon which this defendant was sued. That was an account against other parties for entirely different items sold upon different days and for different amounts. We think the district court properly held "that the instrument, as altered, is not a false instrument, and that the alteration does not make any material change in the instrument itself."

The judgment of the district court is affirmed.⁹⁸

⁹⁸ Alteration of an instrument is as much forgery as making an entire false instrument. The alteration may be by adding something, thereby making it different, or by erasing or eliminating some part, as by cutting it off. But the alteration must be a material one. See cases in 19 Cyc. 1374-1375.

WALKER v. STATE.

1906. SUPREME COURT OF GEORGIA. 127 Ga. 48, 56 S. E. 113,
8 L. R. A. (N. S.) 1175, 119 Am. St. 314.

BECK, J.⁹⁹—The defendant, Walker, was indicted for the offense of forgery, one of the counts of the indictment charging that "said Reuben Walker and [codefendant] did then and there falsely pass, utter, and publish said check as true, well knowing that the same was falsely and fraudulently made, signed, forged, and counterfeited." And the judge charged the jury the law applicable to this count in the indictment. The movant excepted to this portion of the judge's charge, alleging that "there was no evidence in the case to authorize the same, and it gave the State the benefit of a theory to which it was not entitled under the evidence in the case." In this connection, Mr. Wynn, a witness for the State, testified as follows: "I was in the mercantile business in the early part of the year. Reuben Walker came to the store some time in February. He came in the store and said he would trade some if he could get his check for something like \$70 or \$80 cashed; that Mr. Cook (the prosecutor) had sold his half of the cotton, and his check was in settlement for it. This was in the latter part of February. I think he said the amount of the check was \$78 or \$79; I did not ask to see it. He said it was on the Bank of Monticello, and that Mr. Cook had given it to him for his half of the cotton." The check alleged to have been forged was on the Bank of Monticello for the sum of \$79.83, and bore the date of February 27, 1906. Mr. Cook, referred to in the above testimony, swore: "I never gave Reuben Walker a check in my life. * * * I did not sign them [the checks alleged to have been forged], nor did I authorize any person to sign them for me. * * * I think the writing on the checks looks like Reuben Walker's."

The sole question presented in the first six grounds of the motion for a new trial is whether or not this testimony shows an uttering and publishing of the check in question. The portions of the court's charge therein complained of state correct principles of law, and it is only necessary to determine whether or not they were applicable to the facts in the case. Mr. Bishop, in his work on Criminal Law (8th ed.), vol. 2, § 605, says: "Since the offense of uttering is an attempt, it is complete when the forged instrument is offered; an acceptance of it is unnecessary. * * * To complete the offense, there must be a representation of genuineness, but ordinarily this is implied in the act of uttering." And Mr. Wharton, in his work on Criminal Law (10th ed.), vol. 1, § 703, says:

⁹⁹ Part of the opinion is omitted.

"To utter and publish a document is to offer directly or indirectly, by words or actions, such document as good." In *State v. Horner*, 48 Mo. 520, the court says: "The law is well and definitely settled that the words 'utter' and 'uttering' mean substantially to offer. If a person offers another a thing—as, for instance, a forged instrument, or a piece of counterfeit coin which he intends to pass as good—that is an 'uttering,' whether the thing offered be accepted or not, and it is said that the offer need not go so far as to be in law a tender. But, to constitute an uttering, there must be a complete attempt to do the particular thing which the law forbids, though there may be a complete conditional uttering as well as any other, which will be criminal. 1 Bish. Cr. Law (1st ed.), § 185, and cases cited in notes. It has been expressly adjudicated that the allegation of uttering and publishing is proved by evidence that the prisoner offered to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was good. *Com. v. Searle*, 2 Bin. (Pa.) 399, 4 Am. Dec. 446; *United States v. Mitchell*, Baldw. Cir. Ct. 367, Fed. Cas. No. 15,787; *Rex v. Shukard*, Russ. & Ryl. 200. See, also, *Smith v. State*, 20 Neb. 284, 29 N. W. 923, 57 Am. Rep. 832." Applying the above rules to the present case, we think there was sufficient evidence to require the issue to be submitted to the jury under proper instructions from the court, and no error was committed in so doing.

Judgment affirmed. All the Justices concur.¹

¹ Forgery and uttering are distinct offenses, and the fact that a defendant has been acquitted of uttering is no bar to his prosecution for forgery of the same instrument. *State v. Blodgett*, 143 Iowa 578, 121 N. W. 685, 21 Ann. Cas. 231; but see *State v. Klughertz*, 91 Minn. 406, 98 N. W. 99, 1 Ann. Cas. 307, holding that an acquittal of uttering is a bar to a prosecution for forgery, where the uttering and forging are done by the same person at the same time, as one transaction, but not where each act is committed by different persons, or by the same person at different times, and as separate acts.

While to constitute forgery proof of a fraudulent intent on the part of the maker of the instrument is required, the maker's intent is immaterial in a prosecution for uttering, provided the instrument is false in fact, and uttered with knowledge of its falsity. *State v. Blodgett*, 143 Iowa 578, 121 N. W. 685, 21 Ann. Cas. 231.

CHAPTER XIII.

CRIMES AGAINST THE HABITATION.

Section 1.—Burglary.

"And now we are come to offenses against the habitation of a man, which are of two kinds: 1. Burglary. 2. Arson. Burglary is a felony at the common law, in breaking and entering the mansion house of another, or (as some say) the walls or gates of a walled town in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not." 1 Hawkins P. C., ch. 38, § 1.

QUINN v. PEOPLE.

1878. COURT OF APPEALS OF NEW YORK. 71 N. Y. 561,
27 Am. Rep. 87.

Error to the General Term of the Supreme Court, in the second judicial department, affirming a judgment of the Court of Sessions of Richmond county, convicting the plaintiff in error of the crime of burglary in the first degree. (Reported below, 11 Hun 336.)

* * *

FOLGER, J.¹—The plaintiff in error was indicted of the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. (2 R. S., p. 668, § 10, subd. 1.) The crime, as there defined, consists in breaking into, and entering in the night time, in the manner there specified, the dwelling house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and entering, and the criminal intent. The questions mooted in this court are whether it is legally proper, in an indictment for burglary of a dwelling house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling house within the intent of the statute. * * *

¹ Part of the statement of facts, and of the opinion, and arguments of counsel are omitted.

As to the second question: In addition to the facts already stated, it is needed only to note that there was an internal communication between the two stores, in the lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only, but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence up stairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling rooms, there was not a breaking into a dwelling house, and hence the act was not burglary in the first degree as defined by the Revised Statutes as cited above. In considering this point, I will first say that the definition of the crime of burglary in the first degree given by the Revised Statutes does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same." * * * 2 Russ. on Cr., p. 1, § *785. It will, therefore, throw light upon this question to ascertain what buildings or rooms were, at common law, held to be dwelling houses or a part thereof, so as to be the subject of burglary. For, as far as the Revised Statutes as already cited are concerned, what was a dwelling house or a part thereof at common law must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same inclosure, and were built close to and adjoining each other. (Case of Gibson, Mutton & Wiggs, Leach's Cr. Cases 357, case 174, recognized in *The People v. Parker*, 4 Johns. 423. In the case from Leach there was a shop built close to a dwelling house in which the prosecutor resided. There was no internal communication between them. No person slept in the shop. The only door to it was in the court-yard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling house of the prosecutor, and the case was reserved for the consideration of the twelve judges. They were all of the opinion that the shop was to be considered a part of the dwelling

house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling house. The case in Johnson's Reports, *supra*, is also significant, from the facts relied upon there to distinguish it from the case in Leach, *supra*. Those facts were that the shop entered, in which no one slept, though on the same lot with the dwelling house, was twenty feet from it, not inclosed by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both so as to bring them within one inclosure, therefore, the case was within that of *The King v. Garland*, 1 Leach Cr. Cas. 130 (or 171), Case 77. It has been urged, in the consideration of the case in hand, that though the common law did go farther than the cases above cited, and did not deem all out-houses, when they were within the same inclosure as the dwelling house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose, and were thus essential or convenient for the enjoyment of the dwelling house as such. Gibson's Case (*supra*), would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling house. The books have many cases to the same end. *Rex v. Gibbons & Kew* (Russ. & Ry., 442), the case of a shop. *Robertson's Case* (4 City Hall Rec. 63), also a shop with no internal communication with the dwelling house. *Rex v. Stock et al.* (Russ. & Ry. 185), a counting room of bankers. *Ex parte Vincent* (26 Ala. 145), one room in a house used as a wareroom for goods; *Rex v. Witt* (Ry. & M. 248), an office for business, below lodging rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings (*Rex v. Jenkins*, Russ. & Ry. 244; *Rex v. Westwood*, *id.* 495, where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes. It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the plaintiff in error. (*State v. Langford*, 1 Dev. 253; *State v. Jenkins*, 5 Jones 430; *State v. Bryant Ginns*, 1 Nott. & McCord 583). Though, in the case last cited, it is conceded that

if a store is entered, which is a part of a dwelling house, by being under the same roof the crime is committed; and it must be so, if it is the circumstance of midnight terror in breaking open a dwelling house, which is a chief ingredient of the crime of burglary; and it is for that reason that barns and other out-houses, if in proximity to the mansion house, are deemed *quasi* dwelling houses, and entitled to the same protection. (State v. Brooks, 4 Conn. 446-449.) Coke 3 Inst. 64 is cited to show that only those buildings or places which in their nature and recognized use are intended for the domestic comfort and convenience of the owner may be the subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth converse"—i. e., be employed or engaged with; Richardson's Dic. *in voce*—"being a parcell of the mansion house, or not parcell, is taken for a mansion house." So Hale is cited (1 vol. P. C. 558); and it is there said that "to this day it is holden no burglary to break open such a shop." But what does he mean by that phrase? That appears from the authority which he cites (Hutton's Reps. 33), where it was held no burglary to break and enter a shop, held by one as a tenant in the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling house. But Hale also (vol. 1 P. C. 557) cites as law the passage from The Institutes above quoted. Other citations from text books are made by the plaintiff in error; they will be found to the same effect, and subject to the same distinction as those from Coke & Hale. And see Rex v. Gibbons *et al.*, *supra*; Rex v. Richard Carroll, 1 Leach Cr. Cas. 237, case 118. That there must be a dwelling house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error, of Rex v. Harris, 2 Leach 701; Rex v. Davies, alias Silk, (*id.*, 876), and the like. There were cases which went further than anything I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling house, but held the crime committed if the building entered was within the same fence or inclosure as the building slept in. And the dwelling house in which burglary might be committed was held formerly to include outhouses—such as warehouses, barns, stables, cow houses, dairy houses—though not under the same roof or joining contiguous to the house, provided they were parcel thereof. (1 Russ. on Cr., *799, and authorities cited.) Any outhouse within the curtilage, or same common fence, with the dwelling house itself was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants

if within the curtilage or home stall. (State v. Twitty, 1 Hayw. (N. C.) 102; State v. Wilson, *id.*, 242. See, also, State v. Ginns, 1 Nott. & McCord, 585, *supra*, where this is conceded to be the common law. See note A to Garland's Case, *supra*.)

It seems clear that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling house. * * *

Allen, Miller and Earl, JJ., concur; Rapallo and Andrews, JJ., dissent; Church, Ch. J., not voting. Judgment affirmed.²

STATE v. McKNIGHT.

1892. SUPREME COURT OF NORTH CAROLINA. 111 N. Car. 690, 16 S. E. 319.

SHEPHERD, C. J.²—The prisoner was indicted for burglary "in the first degree," and on his trial admitted the breaking and entry with the felonious intent as charged in the bill. The propriety of the admission is demonstrated by the decision of this court in State v. Fleming, 107 N. C. 905, 12 S. E. Rep. 131, in which the question as to what constitutes a sufficient breaking is fully discussed and illustrated by many authorities.

The prisoner, however, very seriously insists that the state has failed to adduce sufficient evidence to warrant the jury in finding that the breaking and entry was done in the night time, and it will therefore be necessary to recapitulate so much of the testimony as bears upon this point.

Mrs. S. H. Taylor testified that she had an early supper on the night in question, but not earlier than was her custom; that some time after supper her husband and the other members of the family left the house and went up into the town to be present at an oyster supper at Moore's hotel; that when they left "it was dark, except what light was given by the moon; that it was after daylight had disappeared," and that the lamps in the house had been lighted some time before. On cross-examination she stated that it was her habit to have supper "generally about sundown; that it was no earlier that evening than usual; that at that time of the year the moon was up early in the evening, and as the sun descended

² To constitute burglary at common law, the house broken and entered must be occupied as a dwelling house, but a breaking and entering, in the temporary absence of the occupant, will still be burglary. See cases in 6 Cyc. 185, 186. For decisions as to what out-houses are part of the dwelling see 6 Cyc. 187, 188.

³ Part of the opinion is omitted.

the moon became brighter; that she did not know what time it was; it was after night; was after daylight down, though early in the night."

Mrs. Galloway, a daughter of Mrs. Taylor, testified that she went with other members of the family to the oyster supper, but that they did not start for some time after they had taken supper at home; that when they started the lamps in the house had been lighted, and "it was dark, except the light from the moon; it was after daylight down."

Sir William Blackstone (4 Bl. Com. 224) says that "anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglars would go unpunished." "In the law of burglary there must not be daylight enough to discern a man's face." Anderson's Law Dic. 709; Com. v. Chevalier, 7 Dana Abridgment 134; State v. Bancroft, 10 N. H. 105; People v. Griffin, 19 Cal. 578.*

It will not avail the prisoner, however, "if there was light enough from the moon, street lamps and buildings, aided by snow, to discern the features of another person." State v. Morris, 47 Conn. 179. Doctor Wharton says (2 Crim. Law 1594): "But there are moonlight nights in which the countenance can be discerned far more accurately than on some foggy days; and besides this, what such light is depends upon the vision of the witness. The jury must determine the question independently of this capricious test." Some authorities declare "that by 'night time' is meant that period between the termination of daylight and the earliest dawn in the morning."

Applying either of the tests above mentioned, we are entirely satisfied that there was sufficient testimony to warrant the finding of the jury that the offense was committed in the night time. The exception is therefore without merit. * * *

Affirmed.

TIMMONS v. STATE.

1878. SUPREME COURT OF OHIO. 34 Ohio St. 426, 32 Am. Rep. 376.

The plaintiff was indicted, convicted, and sentenced for burglary in the court below.

The entire testimony in the case is not brought upon the record,

* Accord: State v. Clark, 42 Vt. 629; Klieforth v. State, 88 Wis. 163, 59 N. W. 507, 43 Am. St. 875; State v. Morris, 47 Conn. 179 (holding that burglary is committed though the defendant's face could be discerned by artificial light or moonlight).

but the tendency of so much thereof as is necessary to an understanding of the question made is set out. From this it appears that the prisoner was found in the dwelling house of the prosecuting witness in the night time; that the doors of the house were still locked when the prisoner was found therein; that the only means of ingress was through the transom over the door; that the transom was found open when the prisoner was found in the house; "that the transom swings on its hinges like an ordinary door"; that there was a button for fastening it, but that the transom was closed, by the wife of the prosecuting witness, on the evening of the night of the entry, with a broom, but she did not fasten it with the button.

The court charged: "That if the jury was satisfied beyond a reasonable doubt as to all the other elements necessary to constitute a burglary (which were explained) except a breaking, and found that the said transom was closed on the night in question, though not fastened, and that the prisoner used sufficient force to push it from its place, so that it would swing open, that that was a sufficient breaking in law, and that their verdict under these circumstances, if satisfied beyond a reasonable doubt, should be guilty."

* * *

GILMORE, J.⁵—* * * Did the court err in charging the jury that if the transom was closed, though not fastened, and the prisoner used sufficient force to push it from its place, so that it would swing open, that that was a sufficient breaking in law?

Our statute defining burglary provides: "Whoever, in the night season, maliciously and forcibly breaks and enters any dwelling house," etc. The word forcibly is not used in the common-law definition, in which the words are "break and enter." But in our statute the word forcibly only expresses the degree of force that was implied at common law from the word "break." Hence, under statute, as at common law, there may be a constructive forcible breaking, as where an entrance is obtained by trickery or deception. *Ducher v. The State*, 18 Ohio 308.

We may therefore look to the principles of the common law in determining what will constitute a forcible breaking under our statute.

In England for more than two hundred years it has been settled that there can be no burglary without an actual breaking. And in Sir Matthew Hale's time (1 Hale's P. C. 552) these acts amounted to an actual breaking, viz.: "Opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, and to put back the leaf of a window with a dagger," etc.

In *Brown's case*, decided in 1799 (2 East's P. C. 489), there was

⁵ Arguments of counsel, and part of the opinion are omitted.

an aperture communicating with an upper floor, which was closed by folding doors, with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening, so that those beneath could push them open at their pleasure by a moderate exertion of strength. It was held that the pushing open of these folding doors was sufficient to constitute a breaking.

And it has subsequently been held (1 Moody's C. C. 377) that the lifting of a flap of a cellar, usually kept down by its own weight, is a sufficient breaking for the purpose of burglary. And in *Rex v. Hall*, 2 R. & R. C. C. 355, it is held that where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. And in *Rex v. Haines*, *ib.* 450, it is decided that the pulling down of the sash of a window is a breaking, though it has no fastening and is only kept in its place by the pulley-weight; it is equally a breaking although there is an outer shutter which is not put to. In *Rex v. Hyams*, 7 Car. & Payne 441, it is held that raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking of a dwelling house.

These authorities clearly show that only a slight degree of force is necessary to constitute a burglarious breaking at common law.

The following American cases are to the same effect as *Rex v. Hyams*, above cited. *The State v. Boon*, 13 Iredell 244; *Frank v. State*, 39 Miss. 705; *The People v. Edwards*, 1 Wheeler's Cr. C. 371.

The principle, as laid down in the cases above cited in 2 East and 1 Moody's C. C., as to the cellar or flap doors kept down by their own weight, is followed in the case of *Dennis v. The People*, 27 Mich. 151, where it is held that an entry into a building by raising a transom window, attached by hinges above, and arranged to fall into the frame by its own weight, when the window was shut into the frame, so as to require some force to open it, is a sufficient breaking, under the statute of that state punishing the breaking and entering an office, shop, etc., in the night time.

No court or text writer has undertaken to define the exact degree of force that is necessary to constitute a breaking in burglary; nor indeed would it be practicable to do so. The law on the subject is found in decided cases in which it is announced in connection with a given state of facts, to which it is applied; and, in that way, reasonable certainty has been attained as to what facts will, or will not, in most cases, constitute a burglarious breaking. But there are cases in which the facts are of such a character as to render it difficult to determine whether in law they constitute a burglary or a trespass.

But, from the cases above cited, it is plainly the law that where

no force is used, as in entering through an open door or window, there is no breaking, and, hence, only a trespass.

On the other hand, where only slight force is used, as where a flap door or a window is closed down and kept in place only by its own weight, the force that is necessary to vertically raise it so as to effect an entrance is sufficient to constitute a burglarious breaking.

There may exist an appreciable difference between the force that would be required to vertically raise a window that was closed and held down by its weight, and that which would be required to push open a closed, but unfastened transom, that swings back horizontally on hinges, as in the case before us; and, admitting there is such a difference, the question is whether the force required to accomplish the latter is sufficient to constitute a burglarious breaking? We think an affirmative answer may safely be given.

The application of the law does not depend upon the degree of the force used, but upon the fact that force of some degree, however slight, was used. The force required to push open the transom in question was undoubtedly slight, but still it must have been an appreciable force, sufficient to overcome the friction of the hinges, occasioned by the weight of the transom, and this, under the circumstances, is all that the law requires.

The case of *The State v. Reid*, 20 Iowa 413, is in point. It is there decided that "the pushing open of a closed door, with the intent expressed in the statute, is a sufficient breaking, within the meaning of the law, to constitute burglary."

We find no error in the charge of the court, under which the jury had to find that the transom was pushed from its place, which implies some degree of force, before they could find the prisoner guilty; and this finding is not before us for review on the evidence.

Motion overruled.⁶

WALKER v. STATE.

1879. SUPREME COURT OF ALABAMA. 63 Ala. 49, 35 Am. Rep. 1.

BRICKELL, C. J.⁷—The statute (Code of 1876, § 4343) provides

⁶ It has been held that further opening a door or window, already partly open, but not open wide enough to permit entrance, is not burglary. *Commonwealth v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556; *Rose v. Commonwealth*, 19 Ky. L. 272, 40 S. W. 245; but see, contra, recent decisions in *People v. White*, 153 Mich. 617, 117 N. W. 161, 15 Ann. Cas. 927, and *Claiborne v. State*, 113 Tenn. 261, 83 S. W. 352, 68 L. R. A. 859, 106 Am. St. 833, and cases there cited. It is burglary for one lawfully in a dwelling, or for one who has entered through an open door or window, to break an inner door. *Rolland v. Commonwealth*, 85 Pa. St. 66, 27 Am. Rep. 626; *Anderson v. State*, 17 Tex. App. 305; *McCourt v. People*, 64 N. Y. 583.

⁷ Statement of facts, and argument of counsel are omitted.

that "any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling house, or any building, structure or inclosure within the curtilage of a dwelling house, though not forming a part thereof, or into any shop, store, warehouse, or other building, structure or inclosure in which any goods, merchandise or other valuable thing is kept for use, sale, or deposit, provided such structure, other than a shop, store, warehouse, or building, is specially constructed or made to keep such goods, merchandise, or other valuable thing, is guilty of burglary," etc.

The defendant was indicted for breaking into and entering "a corn crib of Noadiah Woodruff and Robert R. Peeples, a building in which corn, a thing of value, was at the time kept for use, sale, or deposit, with intent to steal," etc. He was convicted; and the case is now presented on exceptions taken to instructions given, and the refusal of instructions requested as to what facts will constitute a breaking into and entry, material constituents of the offense charged in the indictment. The facts, on which the instructions were founded, are: That in the crib was a quantity of shelled corn, piled on the floor; in April or May, 1878, the crib had been broken into, and corn taken therefrom, without the consent of the owners, who had the crib watched; and thereafter the defendant was caught under it, and on coming out, voluntarily confessed that about three weeks before he had taken a large auger and, going under the crib, had bored a hole through the floor, from which the corn, being shelled, ran into a sack he held under it; that he then got about three pecks of corn, and with a cob closed the hole. On these facts the city court was of opinion, and so instructed the jury, that there was such a breaking and entry of the crib as would constitute the offense, and refused instructions requested asserting the converse of the proposition.

The material changes the statute has wrought as to the offense of burglary, as known and defined at common law, are as to the time and place of its commission. An intent to steal, or to commit a felony, are the words of the statute, while an intent to commit a felony were the words of the common law. Under our statutes a felony is defined as a public offense, punished by death, or by imprisonment in the penitentiary; while public offenses otherwise punishable are misdemeanors. The larceny of other than personal property particularly enumerated, and under special circumstances, the property not exceeding the value of \$25, is petit larceny, and a mere misdemeanor. The intent to steal, as an element of burglary, is therefore made the equivalent of an intent to commit a felony, though the value of the thing intended to be stolen may be less than \$25, and its larceny a misdemeanor.

The statute employs the words, "breaks into and enters," and

these are borrowed from the common-law definition of burglary. They must be received with the signification, and understood in the sense given them at common law. "There must, in general," says Blackstone, "be an actual breaking, not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption." The degree of force or violence which may be used is not of importance—it may be very slight. The lifting the latch of a door; the picking of a lock, or opening with a key; the removal of a pane of glass, and, indeed, the displacement or unloosing of any fastening, which the owner has provided as a security to the house, is a breaking—an actual breaking—within the meaning of the term as employed in the definition of burglary at common law, and as it is employed in the statute. In Hughes' case, 1 Leach C. C. case 178, the prisoner had bored a hole with a center-bit through the panel of the house door, near to one of the bolts by which it was fastened, and some pieces of the broken panel were found within-side the threshold of the door, but it did not appear that any instrument except the point of the center-bit, or that any part of the prisoner's body had been within-side the house, or that the aperture made was large enough to admit a man's hand. The court were of opinion that there was a sufficient breaking, but not such an entry as would constitute the offense.

The boring the hole through the floor of the crib was a sufficient breaking, but with it there must have been an entry. Proof of a breaking, though it may be with an intent to steal or the intent to commit a felony, is proof of one only of the facts making up the offense, and is as insufficient as proof of an entry through an open door without breaking. If the hand or any part of the body is intruded within the house the entry is complete. The entry may also be completed by the intrusion of a tool or instrument within the house, though no part of the body be introduced. Thus, "if A breaks the house of B in the night time, with intent to steal goods, and breaks the window and puts in his hand, or puts in a hook or other engine to reach out goods, or puts a pistol in at the window, with an intent to kill, though his hand be not within the window, this is burglary." 1 Hale 555. When no part of the body is introduced—when the only entry is of a tool or instrument introduced by the force and agency of the party accused, the inquiry is whether the tool or instrument was employed solely for the purpose of breaking, and thereby effecting an entry, or whether it was employed not only to break and enter, but also to aid in the consummation of the criminal intent and its capacity to aid in such consummation. Until there is a breaking and entry the offense is not consummated. The offense rests largely in intention, and though there may be sufficient evidence of an attempt to commit

it, which of itself is a crime, the attempt may be abandoned—of it there may be repentance before the consummation of the offense intended. The breaking may be at one time and the entry at another. The breaking may be complete, and yet an entry never effected. From whatever cause an entry is not effected, burglary has not been committed. When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated and necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent, the offense is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law.

Let the judgment be affirmed.

Judgment affirmed.⁸

ROBINSON v. STATE.

1879. COURT OF APPEALS OF MARYLAND. 53 Md. 151,
36 Am. Rep. 399.

ALVEY, J.⁹—The indictment in this case charges the prisoner with feloniously and burglariously breaking and entering, in the night time, the dwelling house of one Morgan, with intent the goods and chattels of the said Morgan, then and there being, feloniously to steal, take, and carry away.

According to the common-law definition of a burglar, as given us by Lord Coke (3d Inst. 63), it is "he that in the night time breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within

⁸ Accord: *State v. Crawford*, 8 N. Dak. 539, 80 N. W. 193, 46 L. R. A. 312, 73 Am. St. 772.

⁹ Arguments of counsel are omitted.

the same, whether his felonious intent be executed or not." This definition has been adopted by Hale, Hawkins, and Blackstone. 1 Hale's P. C. 549; Hawk. P. C., b. 1, ch. 38, § 1; 4 Bl. Com. 224.

One of the elements essential to constitute the crime, according to this definition, is the felonious intent with which the breaking and entry of the house may have been effected. If not with such intent, then the breaking and entry would be at the common law nothing more than a trespass. 4 Bl. Com. 227. Therefore the breaking and entry of a dwelling house at night with intent to commit a battery, or with an intent to commit adultery, is not a felony. *Com. v. Newell*, 7 Mass. 247; *State v. Cooper*, 16 Vt. 551.

It was therefore very material, on the question of intent, to show for what object the prisoner broke and entered the house. If he really entered the house solely for the purpose of having illicit connection with the prosecuting witness, he could not be found guilty of burglary. Proof of the fact of such being his object would be difficult to furnish otherwise than as it might be inferred from the previous relations of the parties, and such circumstances as would be calculated to induce a belief in the mind of the prisoner that he would be readily and willingly received by the witness. We gather from the testimony that the witness, Mrs. Morgan, was a licentious, dissolute woman, and she herself proves that the prisoner had, upon two former occasions at least, been to see her, and had visited other women in the same house. The entry into the house was in the absence of the husband of the witness, and when the prisoner was first discovered he was in her bedroom. Upon being accosted by the witness, instead of trying to conceal his identity, he gave his name and sought recognition. With these facts in proof, we think the evidence offered by the prisoner, as set out in the bills of exception, when coupled as it was with the proffers to follow it up in the manner stated in the exceptions, should have been admitted. If it be true, as offered to be shown, that the prisoner had knowledge, at the time of his entry into the house, of the lewd and lascivious habits and character of the witness, or that he had had improper intimacy or intercourse with her, these were circumstances proper to be left to the jury for their consideration in passing upon the question of intent with which the act was done.

We must therefore reverse the rulings contained in the exceptions and award a new trial.

Rulings reversed and new trial awarded.

Section 2.—Arson.

"The felony of arson or wilful burning of houses is described by my Lord Coke, cap. 15, p. 66, to be the malicious and voluntary burning the house of another by night or by day. * * *

"It extendeth not only to the very dwelling house, but to all outhouses, that are parcel thereof, tho' not contiguous to it, or under the same roof; as in case of burglary, the barn, stable, sheep house, dairy house, mill house. * * *

"It must be a wilful and malicious burning, otherwise it is not felony, but only a trespass. And therefore if A shoot unlawfully in a hand gun, suppose it be at the cattle or poultry of B, and the fire thereof sets another's house on fire, this is not felony, for tho' the act he was doing were unlawful, yet he had no intention to burn the house thereby, against the opinion of Dalt., cap. 105, p. 270.

"But if A have a malicious intent to burn the house of B and in setting fire to it burns the houses of B and C, or the house of B escapes by some accident, and the fire takes in the house of C and burneth it, tho' A did not intend to burn the house of C, yet in law it shall be said the malicious and wilful burning of the house of C and he may be indicted for the malicious and wilful burning of the house of C. Co. P. C., p. 67. * * *

"And it seems unquestionable that the burning of a dwelling house, or any part thereof, or any outhouse part thereof was a felony at common law, and so was also the burning of a barn with hay or corn in it, tho' not parcel of a dwelling house, but standing at a distance. Co. P. C., p. 67, 11 H. 7, 1 b." 1 Hale P. C., ch. 49, 566-570.¹⁰

STATE v. MCGOWAN.

1850. SUPREME COURT OF ERRORS OF CONNECTICUT. 20 Conn. 245, 52 Am. Dec. 336.

By Court, CHURCH, J.¹¹—The statute of this state prescribes the punishment of arson, but it does not define the crime. We look to the common law for its definition.

Arson, by the common law, is the wilful and malicious burning of the house of another. The word "house," as here understood, includes not merely the dwelling house, but all outhouses which are parcel thereof. 1 Hale's C. L. 570; 4 Bla. Com. 221; 2 Russ. on Crimes 551.

This information charges the accused with burning a dwelling

¹⁰ Accord: *State v. Porter*, 90 N. Car. 719. In 2 Wharton's *Crim. Law* (11th ed.) the author explains that barns are often occupied by persons in charge of the cattle, and their nearness to the dwelling and inflammable character, in case of fire, endangers the dwelling, so that it was held arson at common law to maliciously set fire to a barn, if the fire extended to the dwelling.

¹¹ The statement of facts, and arguments of counsel are omitted.

house, and the question in the case is whether the building, which was in fact burned by him, was a dwelling house within the meaning of the common law on this subject. That it was a dwelling house, as distinguished from a building of any other kind, is certain.

The building is described to be one built and designed for a dwelling house, constructed in the usual manner. It was designed to be painted, but was not yet finished in that respect, and not quite all the glass was set in one of the outer doors. The building had never been occupied, and it was not parcel nor an appurtenant of any other.

We think this was not a dwelling house in such a sense as that to burn it constituted the crime of arson. In shape and purpose it was a dwelling house, but not in fact, because it had never been dwelt in—it had never been used, and was not contemplated as then ready for the habitation of man.

Arson, as understood at the common law, was a most aggravated felony, and of greater enormity than any other unlawful burning because it manifested in the perpetrator a greater recklessness and contempt of human life than the burning of any other building, and in which no human being was presumed to be. Such seems to be the spirit of the English cases on this subject, and especially the late case of *Elsmore v. The Hundred of St. Briavells*, 8 Barn. & Cress. 461 (15 Eng. Com. L. 266), 2 Russ. on Crimes 556. In that case Bayley, J., in speaking of the building therein described, says: "It appeared to have been built for the purpose of being used as a dwelling house, but it was in an unfinished state and never was inhabited. There can not be a doubt that the building in this case was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, though it was not inhabited. It was not, therefore, a dwelling house, though it was intended to be one."

A dwelling house, once inhabited as such, and from which the occupant is but temporarily absent, would not fall within the foregoing principle.

It may not be necessary, to determine another question made in this case—whether it appertained to the court or the jury to determine the character of the building. But we think it was the duty of the court to have instructed the jury as to the law of the matter, and leave it to them to say from the proof whether the building was a house within the meaning of the law thus explained.

The considerations we have now expressed induce us to grant a new trial of this cause.

In this opinion the other judges concurred.

New trial to be granted.

LIPSCHITZ v. PEOPLE.

1898. SUPREME COURT OF COLORADO. 25 Colo. 261, 53 Pac. 1111.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court.¹²
* * * It is conceded by counsel on both sides that, at the common law, arson was a crime against the habitation, rather than against property rights. 2 Am. & Eng. Enc. Law (2d ed.) 924, 935; 2 Bish. New Cr. Law, ch. 2; 1 Whart. Cr. Law (10th ed.), ch. 11; *Mary v. State*, 81 Am. Dec. 60, and notes.

To cite all the cases to this effect, as well as those so construing certain statutes, would unduly prolong the opinion. They are collated in the foregoing text books and leading cases. The question here is whether our statute has effected any change in the common-law rule. We think that it has. Not only are a large number of things embraced within the statute that were not subjects of arson at the common law, but the language employed evidences an intention to enlarge its common-law meaning. The phrase "the property of any other person" relates to and qualifies "dwelling house" as clearly and fully as it does "storehouse" or "other building"; that is, one may commit arson by burning a storehouse, or any other building, the property of any other person, just as certainly as he can by burning a dwelling house, the property of any other person. In other words, the building, whether a "dwelling house" or "other building," if it belong to any other person, is the subject of arson, even though it be occupied by the defendant himself; or, to put the proposition in another form, the apparent intent of the legislature was not only to continue the common-law offense against the security of the dwelling house, but to protect property rights as well; and when it is considered that any kind of a building, if it is the property of another, whether occupied or not, regardless of its value, and irrespective of its proximity to a dwelling house, and whether or not its remoteness renders almost impossible any danger to the security of a dwelling house by the burning of such other building, and when it is further considered that a bridge of the value of \$50 is made the subject of arson, it seems quite conclusive that the plain intention of the law-making power was to protect property rights, and to punish the burning of the property of another person, as well as to protect occupancy or possession.

We are not without direct authority in favor of this conclusion, although it may be conceded that more cases can be found apparently against than in favor of it; yet many of the contrary decisions are not directly in point, and are based upon statutes quite unlike ours, while the following are under statutes which, in sub-

¹² Statement of facts, and part of the opinion are omitted.

stantial respects, are like ours, and they are in harmony with our view. *Garrett v. State*, 109 Ind. 527, 10 N. E. 570; *Allen v. State*, 10 Ohio St. 287; *People v. Simpson*, 50 Cal. 304; *Shepherd v. People*, 19 N. Y. 537; *McClaine v. Territory*, 1 Wash. St. 345; *State v. Biles*, 6 Wash. 186, 33 Pac. 347; *State v. Hurd*, 51 N. H. 176; *State v. Moore*, 61 Mo. 276. * * *

Upon a careful examination of our statute, in the light of the authorities cited, and upon principle, we must hold that the protection of property rights under our statute is made as prominent as the protection of the security of the dwelling house, and is included therein.

But it is said that, under the facts of this case, the ownership is not properly laid in Peter Winne as trustee. The argument is that the defendant himself was the owner of the property in the sense of the term as used in the statute; and, as he was in actual possession at the time of the alleged conspiracy, the prosecution must fail. Under the doctrine of *Stephens v. Clay*, 17 Colo. 489, 30 Pac. 43; *Milling Co. v. Costigan*, 21 Colo. 471, 42 Pac. 647; *Fisk v. Reser*, 19 Colo. 88, 34 Pac. 572; and *Reid v. Sullivan*, 20 Colo. 498, 39 Pac. 338—the legal title of this property was in Peter Winne. The interest which the defendant had in it was a contingent interest, depending upon his payment of the notes secured by the trust deed; and this ownership consisted simply of an equity of redemption. As we have held that one object of our statute was to protect the rights of property, and as, under our decisions, Peter Winne holds the legal title to this property in trust for the benefit of some other person, the ownership of the property was properly laid in him, even though defendant had a contingent interest in it, and was occupying it.

The evidence shows, beyond doubt, that the defendant was guilty of the act attempted to be charged; and it appears, also, that his desire and intention were thereby to secure the amount of the insurance policy. Seizing upon this point, counsel says that the defendant was actuated by express malice against the insurance company, and that is not sufficient to sustain the charge of malice against the owner, and it is essential that the proof show the latter. We may concede that defendant was actuated by express malice against the insurance company. But in arson, as in other crimes, a defendant may, as expressed by Mr. Bishop, have two intents; but, if he has the law's evil intent, his guilt remains, even though he has some other intent—that is to say, even if this defendant was actuated by malice against the insurance company, his conviction should stand in so far as this element of the crime is concerned, if he had malice against the owner of the property. Now, it does not follow that because malice existed against the insurance company it did not also exist against the owner; and the court properly instructed

the jury substantially to the effect that the jury might, from the facts and circumstances of the case, infer malice against the owner, and the law is that the jury may infer this from the mere fact of an unlawful burning, or of a conspiracy to commit arson. 2 Bish. New Cr. Law (10th ed.) § 15. * * *

HEARD v. STATE.

1886. SUPREME COURT OF ALABAMA. 81 Ala. 55, 1 So. 640.

Appeal from the Circuit Court of Perry County.

Tried before the Hon. John Moore.

The material facts are stated in the opinion.

On the trial the court, among other things, charged the jury "that, if they believed from the evidence beyond a reasonable doubt that in this county (Perry) in August, 1886, the defendant wilfully set fire to and burned the gin house, and that it was the property of A. M. Walker, and was of the value of five hundred dollars or more, then defendant was guilty as charged in the indictment, even if they should believe he did it at the instance and request of Walker to enable Walker to get the amount for which it was insured." The appellant excepted to the giving of this charge.¹³

CLOPTON, J.—The defendant was tried and convicted under an indictment found under § 4347 of the Code, which contained two counts, each of which charged him with burning a gin house, the property of A. W. Walker. On his examination as a witness the defendant admitted the burning, but stated that he did it at the instance and by employment of the owner, Walker, who said the building was insured, and that the insurance company had treated him badly, and he wanted to get even. This was denied by Walker, but the denial does not affect the legal question involved, as by the charge of the court an inquiry into the truth of the statement was rendered immaterial. The Circuit Court ruled that the defendant is guilty as charged in the indictment if he willingly set fire to or burned the gin house, and it was the property of Walker, though he did it at the instance and request of the owner, to enable him to get the amount for which it was insured. The instruction raises the question whether a person who burns a building insured against fire, by the request of the owner, to enable him to obtain the insurance money, is guilty of arson, as charged in the indictment.

The statutes, while adding structures other than those included at common law, and dividing arson into three degrees, distinguished

¹³ Argument of counsel is omitted.

by the character of the buildings or structures and the attendant circumstances, were not designed to create new offenses. The essential common-law ingredients of the offense still exist. At common law, and under the statutes, arson is regarded as a public wrong, growing out of an injury to the possession rather than the property. *Adams v. State*, 62 Ala. 177. A man may burn a house owned and occupied by him, or he may procure another to burn it, and neither be guilty of arson, unless the fire is communicated to and burns an adjacent building, the property of some other person,¹⁴ though it would be a misdemeanor if the structure were contiguous to others whereby their safety was endangered. *East P. C.* 1027, 1 Whart. Crim. Law 830; *Sullivan v. State*, 5 Stew. & P. 175. Arson consists in the malicious and voluntary burning of the house of another. Malice is a requisite and constituent under the statutes, as at common law; and an act done by one's self to his own property, no injury resulting to another, can not be the predicate of legal malice. Neither can the defendant be said to have acted maliciously towards Walker if he burned the gin house by his request, to enable him to convert it into money.

If it be said there was a mischievous intent as to the insurance company, malice towards a person, other than the one in whom the property is laid in the indictment, and not named therein, is inadmissible to sustain the charge. If any person wilfully burns a building or any property which is at the time insured against fire, with intent to charge the insurer, it is declared a special offense, and the punishment prescribed by § 4349 of the Code. It is not restricted to burning a building, but extends to any property insured. To convict of this offense the indictment must allege the statutory constituents—insurance against fire, and the intent to charge or injure the insurer. *Martin v. State*, 29 Ala. 30. The section declares an offense separate and distinct from arson as defined in the three sections immediately preceding—an offense including a burning, or procuring to be burned by the owner, not from malice, but with intent to defraud another. The indictments require different allegations, and different proof is called for. St. 9 Geo. I, ch. 22, which enacted that any person who should set fire to any house, barn, or out house should on conviction be adjudged guilty of felony without benefit of clergy, did not contain a qualification that the building should be the property of another. This statute came up for construction in *Spaulding's Case*, 1 Leach 218, who was indicted for maliciously and voluntarily setting fire to his own house. The

¹⁴ If one sets fire to his own house, or to a house other than a dwelling, and the fire extends to an adjacent dwelling, he is guilty of arson. *Isaac's Case*, 2 East P. C. 1031, *State v. Laughlin*, 53 N. Car. 354. See 2 Wharton's Crim. Law (11th ed.) 1258, 1259, for further definition of the intent requisite to the crime of arson, and see, also, *Reg. v. Faulker*, p. 116, *supra*.

buildings adjacent were endangered, and the defendant had his house and the goods in it insured. The statute was construed as not creating a new offense, and the indictment was held bad on the ground that arson at common law was the burning of the house of another. The same construction of the statute was reiterated in other cases. 2 East P. C. 1022. The case of *Com. v. Makely*, 131 Mass. 421, is substantially similar to the present. The defendant was indicted under the General Statutes for burning the dwelling house of Ackert. There was evidence tending to prove that she did it by procurement of Ackert, to enable him to obtain the insurance money. It was held that the indictment is not sustained by proof that the defendant burned the house by the owner's procurement to enable him to obtain money from an insurer.

If the defendant's testimony be true he is guilty of a violation of § 4349, but can not be found guilty as charged in the indictment. The truth of the statement should have been submitted to the jury, with proper instructions, as they may find it to be true or false.

Reversed and remanded.

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